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1348

No.

4015

1348

United States
Circuit Court of Appeals
For the Ninth Circuit.

QUONG DUCK,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

FILED

APR 26 1923

F. D. MONCKTON,
CLERK

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

QUONG DUCK,

Plaintiff in Error,


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UNITED STATES OF AMERICA,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

R. G. RETALLICK, Esq., Fresno, Calif.;

For Defendant in Error:

JOSEPH C. BURKE, Esq., United States Attorney;

HERBERT N. ELLIS, Esq., Special Assistant
United States Attorney.

United States of America, ss.

To The United States of America and to The United States Attorney for the Southern District of California.
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 27th day of January, A. D. 1923, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action numbered 668 Criminal, wherein Quong Duck is Plaintiff in Error and you are the Defendant in Error and you are required to show cause, if any there be, why the judgment and sentence given made and rendered against the said Plaintiff in error as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable (Signed) Oscar A. Trippet United States District Judge for the Southern District of California, this 29th day of Dec., A. D. 1922, and of the Independence of the United States, the one hundred and forty seventh.

Oscar A Trippet

U. S. District Judge for the Southern District
of California.

[Endorsed]:

668 Cr. N. D. IN THE UNITED STATES CIR-
CUIT COURT OF APPEALS for the NINTH CIR-

CUIT QUONG DUCK, Plaintiff in Error vs.
UNITED STATES OF AMERICA, Defendant in
Error. Citation Copy of within citation received
the 29th day of December 1922. Joseph C Burke
United States Atty Herbert N. Ellis Special Asst.
U. S. Atty. FILED DEC 29 1922 CHAS. N.
WILLIAMS, Clerk By W. S. Tufts, Deputy
C L R Bk.

United States of America, ss.

The President of the United States of America,

To the Judges of the District Court of the United
States, for the Southern District of California,
GREETING:

Because in the record and proceedings, and also in
the rendition of the judgment of a plea which is in
the said District Court, before you between The
United States of America, Plaintiff and Quong Duck,
Defendant, No. 668 Criminal, Northern Division, a
manifest error hath happened, to the great damage of
the said Quong Dick as by his complaint appears, and it
being fit, that the error, if any there hath been, should
be duly corrected, and full and speedy justice done
to the parties aforesaid in this behalf, you are hereby
commanded, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things con-
cerning the same, to the United States Circuit Court
of Appeals for the Ninth Circuit, together with this
writ, so that you have the same at the City of San
Francisco, in the State of California, on the 27th day

of January next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. William Howard Taft, Chief Justice of the United States, this 29th day of December in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty seventh.

(Seal)

Chas. N. Williams

Clerk of the District Court of the United States of America, in and for the Southern District of California.

The above writ of error is hereby allowed.

Oscar A. Trippet	By.....
Judge.	Deputy Clerk.

[Endorsed]:

668 Cr. N D. United States Circuit Court of Appeals for the NINTH CIRCUIT QUONG DUCK Plaintiff.. in Error vs. UNITED STATES OF AMERICA Defendant.. in Error Writ of Error Copy of the within writ received this 29th day Dec. 1922 Joseph C Burke United States Atty Herbert N. Ellis Special asst. U. S. atty. FILED DEC 29 1922 CHAS. N. WILLIAMS, Clerk By W. J. Tufts. Deputy.

I hereby certify that a copy of the within Writ of Error was on the 29 day of December, 1922, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Chas N Williams

Clerk of the District Court of the United States for
the Southern District of California.

By R S Zimmerman

Deputy Clerk.

No. _____

Filed _____

Violation: Act of February 9, 1909 as amended,
known as the Opium Act.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN DIS-
TRICT OF CALIFORNIA NORTHERN DI-
VISION.

At a stated term of said Court, begun and holden
at the City of Fresno, County of Fresno, within the
Northern Division of the Southern District of Cali-
fornia, on the *furst* Monday in May, in the year
of our Lord, one thousand nine hundred and twenty-
two:

The Grand Jurors of the United States of America,
chosen, selected and sworn, within and for the di-
vision and district aforesaid, on their oaths present:

That QUONG DUCK, whose full and true name,
other than as herein stated, is to the Grand Jurors
unknown, late of the Northern Division of the South-
ern District of California, heretofore, to-wit: on or

about the 26th day of July, A. D. 1922, at the City of Fresno, County of Fresno, within the division and district aforesaid, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully, unlawfully and feloniously, receive, conceal and sell opium prepared for smoking and yen shee, to-wit: about two (2) grains of opium prepared for smoking and about nineteen (19) drams of yen shee, which had theretofore been clandestinely brought and imported into the United States from a foreign country, the said foreign country and the exact time and place of said importation being to the Grand Jurors unknown, after the first day of April, 1909, contrary to law, the said defendant then and there well knowing that the said opium prepared for smoking and the yen shee then and there had been so imported into the United States contrary to law, in violation of the Act of February 9, 1909, as amended, commonly known as the Opium Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further give the Court to understand and be informed:

That QUONG DUCK, whose full and true name, other than as herein stated, is to the Grand Jurors unknown, late of the Northern Division of the Southern District of California, heretofore, to-wit: on or

about the 26th day of July, A. D. 1922, at the City of Fresno, County of Fresno, within the division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously facilitate the transportation, concealment and sale of opium prepared for smoking and yen shee, to-wit: about two (2) grains of opium prepared for smoking and about nineteen (19) drams of yen shee, which had theretofore been clandestinely brought and imported into the United States from a foreign country, the said foreign country and the exact time and place of said importation being to the Grand Jurors unknown, after the first day of April, 1909, contrary to law, the said defendant then and there well knowing that the said opium prepared for smoking and the yen shee then and there had been so imported into the United States contrary to law, in violation of the Act of February 9, 1909, as amended, commonly known as the Opium Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Joseph C Burke

United States Attorney

Herbert N. Ellis

Special Assistant U. S. Attorney

[Endorsed]:

No. 668 Crim. UNITED STATES DISTRICT COURT, SOUTHERN District of CALIFORNIA NORTHERN Division.

THE UNITED STATES OF AMERICA vs.
 QUONG DUCK INDICTMENT Viol: Opium
 Act. A true bill, R. W Barnwell Foreman.

Filed this 11th day of November, A. D. 1922.
 Chas. N. Williams Clerk. Bail \$5,000.

At a stated term, to wit: The November Term,
 A. D. 1922 of the District Court of the United States
 of America, within and for the Northern Division
 of the Southern District of California, held at the
 Court Room thereof, in the City of Fresno, on Mon-
 day the 13th day of November, in the year of our
 Lord one thousand nine hundred and twenty-two.

Present:

The Honorable OSCAR A. TRIPPET District
 Judge.

United States of America, Plaintiff;	}	No. 668 Crim. N. D.
vs.		
Quong Duck, Defendant.		

This cause coming on at this time for arraignment
 and plea of defendant Quong Duck; H. N. Ellis, Esq.,
 Assistant United States Attorney, appearing as coun-
 sel for the Government; defendant being present in
 court with his attorney J. K. Tuttle, Esq. and de-
 fendant having been arraigned, thereupon said defend-
 ant waives the reading of the Indictment and states
 his name to be as given therein; and, upon being re-
 quired to plead, interposes his plea of NOT GUILTY:
 Now, good cause appearing therefor, it is by the
 court ordered that this cause be continued to Novem-
 ber 20th, 1922 for the trial of defendant in this cause.

At a stated term, to wit: The November Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, on Monday the 27th day of November, in the year of Our Lord one thousand nine hundred and twenty-two.

Present:

The Honorable OSCAR A. TRIPPET District Judge.

United States of America, Plaintiff,	}	No. 668
vs.		
Quong Duck, Defendant.		

This cause coming on at this time for trial of defendant herein; Mack Meader, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendant being present in court with his attorney R. P. Rellatik, Esq., Fred Ferguson being also present in his official stenographic capacity as stenographic reporter of the testimony and proceedings and counsel having announced their readiness to proceed with the trial of this cause, it is by the court ordered that this cause be proceeded with and thereupon the court ordered the following twelve names drawn from the jury box, to wit: Wm. C. Kennedy; N. Hanson; F. A. Berg; Jos. L. Beall; Wm. F. Dunn; H. J. Bartram; A. E. Chartrand; Levi McNie; F. M. Roessler; W. C. Ficklin; Ed. Edwards and E. E. Slater;

and

said petit jurors having been called and sworn on

voir dire and passed for cause by the court and by counsel for the respective parties for cause and

Said Ed Edwards having been peremptorily challenged by counsel for the plaintiff and by the court excused; and

The court having ordered the name of one more petit juror drawn from the jury box, said name being J. A. Ward and said J. A. Ward having been called and sworn on voir dire and examined by the defendant for cause and by the court excused; and

The court having ordered the name of one more petit juror drawn from the jury box, said name being C. A. Peters, Jr. and said C. A. Peters, Jr. having been called and sworn on voir dire and passed for cause by the court and by counsel for the respective parties; and

Counsel for the respective parties not having desired to exercise their right to peremptorily challenge the petit jurors now in the box, it is by the court ordered that said petit jurors be sworn in a body as the jury to try this cause; said jury as sworn being composed of the following named petit jurors, to wit:

THE JURY

- | | |
|--------------------|----------------------|
| 1. Wm. C. Kennedy, | 7. A. E. Chartrand, |
| 2. N. Hanson, | 8. Levi McNie, |
| 3. F. A. Berg, | 9. F. M. Roessler, |
| 4. Jos. L. Beall, | 10. W. C. Ficklin, |
| 5. Wm. F. Dunn, | 11. E. E. Slater, |
| 6. H. J. Bartram, | 12. C. A. Peter, Jr. |

Now, at the hour of —o'clock A. M. the court admonishes the jury herein that during the progress of this trial they are not to speak to anyone about

this cause or any matter or thing therewith connected, and that until said cause is finally submitted to them for their deliberation under the instruction of the court they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them and declares a recess to the hour of ten o'clock A. M. November 28th, 1922 at which time the jury herein are instructed to present themselves for further attendance upon this cause.

At a stated term, to-wit: The November Term, A. D. 1922 of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, on Tuesday the 28th day of November, in the year of Our Lord one thousand nine hundred and twenty-two.

Present:

The Honorable OSCAR A. TRIPPET District Judge.

United States of America, Plaintiff,	}	No. 668 Crim. N. D.
vs.		
Quong Duck, Defendant.		

This cause coming on this day for further trial of defendant Quong Duck; H. N. Ellis, Esq., appearing as counsel for the Government; and R. P. Retallick, Esq., appearing as counsel for the defendant; Fred Ferguson being present as shorthand reporter and having been sworn as such; and

Andrew W. Roberts, a witness herein on behalf of the Government, having been called and sworn, and having testified for the plaintiff; and

In connection with the testimony of said witness, the following exhibit having been offered and admitted in evidence, to-wit:

U. S. Ex. 1—Suit cases and contents: Lamp, pipe, bowls, opium, yenshee, etc.;

Now, at the hour of 11:00 o'clock A. M., the court having admonished the jury that, during the progress of this trial they are not to speak to anyone about this case or any matter or thing therewith connected, and that until said case is finally submitted to them for their deliberation under the instruction of the court they are not to speak to each other about this cause or form or express any opinion concerning the merits of the trial until it is finally submitted to them; and the court thereupon ordered that a recess be taken for two minutes; and

Thereafter, at the expiration of recess, Court having reconvened, and counsel, shorthand reporter and defendant being present as before, and it having been particularly noted that the jurors are present, and said jurors all being present in court; and

Andrew W. Roberts, a witness on behalf of the Government, heretofore sworn, having been recalled, and cross-examined by counsel for the defendant; and

Guy Baker, a witness herein on behalf of the Government, having been called and sworn, and having testified on behalf of the plaintiff; and

The Government having thereupon Rested; and

Geo. King Quong and Frank Truax, each having respectively called and sworn, and each of having respectively testified on behalf of the defendant herein; and

Albert H. Won having been sworn as Interpreter of the Chinese language into English and the English language into Chinese; and

Quong Duck, defendant herein, having, through said Interpreter, been sworn as a witness in his own behalf and having testified, and having been cross-examined on behalf of the Government by H. N. Ellis, Esq., Assistant U. S. Attorney; and

The usual admonition as at the morning recess having thereupon been given the jury, a recess is thereupon ordered until the hour of 2 o'clock P. M., of this day;

And now, at the hour of 2 o'clock P. M., the jury having reconvened, and counsel, shorthand reporter and defendant being present as before; and it having been particularly noted that the jurors are all present, and all of said jurors being present in court; and

Defendant Quong Duck, heretofore sworn herein, having resumed the stand, and having testified on cross-examination; and

Joseph Barrett, a witness herein on behalf of the defendant, having been called and sworn, and having testified herein; and

Defendant having thereupon Rested; and

Andrew W. Roberts, a witness on behalf of the Government, heretofore sworn, resumes the stand and testifies herein; and

The Government having thereupon rested; and

H. N. Ellis, Esq., Assistant U. S. Attorney, having thereupon presented argument on behalf of the Government; and

R. P. Retallick, Esq., counsel for the defendant having thereupon presented argument on behalf of defendant; and

H. N. Ellis, Esq., Assistant U. S. Attorney in rebuttal, having argued on behalf of the Government; and

Now, at the hour of 2:45 P. M., the Court having instructed the jury regarding the law of the case; and John Henderson having been sworn as bailiff to care for the jury; and thereafter, at the hour of 3:00 o'clock P. M., the jury retire to the jury-room for the purpose of deliberating upon a verdict, in charge of said bailiff; and

Thereafter, at the hour of 4:00 o'clock P. M., the jury return into the Court Room, and having been asked by the Court if they have agreed upon a verdict, and having, through their Foreman, replied that they have been unable to agree, and are thereupon ordered to retire for further deliberation of a verdict; and

Now, at the hour of 4:20 o'clock P. M., the jury again return into the Court Room in charge of said Bailiff, and having again been asked if they have agreed upon a Verdict, and having, through their Foreman, replied that they have so agreed, and, upon being required to present their Verdict, and having presented their Verdict, which is read by the Clerk,

and by the Court ordered filed and entered herein; and said Verdict as so presented and read being as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

UNITED STATES OF AMERICA	}	668 Crim.
QUONG DUCK		

v

WE THE JURY IN THE ABOVE ENTITLED CAUSE FIND THE DEFENDANT QUONG DUCK NOT GUILTY AS CHARGED IN THE FIRST COUNT OF THE INDICTMENT, AND GUILTY AS CHARGED IN THE SECOND COUNT OF THE INDICTMENT.

FRESNO, CALIFORNIA

NOVEMBER 28 1922

C A Peter Jr

FOREMAN

[Endorsed]:

Filed November 28 1922 Chas N. Williams Clerk
By Louis J Somers deputy.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION. United States of America v. Quong Duck, 668 Crim. We the jury in the above entitled cause find the defendant Quong Duck not guilty as charged in the first count of the Indictment and guilty as charged in the second count

of the Indictment. Fresno, California November 28, 1922 C. A. Peter, Jr. Foreman.

The Court thereupon ordered that the defendant be remanded to the custody of the U. S. Marshal, and that this cause be continued to December 4th, 1922, for the imposing upon defendant of sentence.

At a stated term to wit: The November Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, on Monday the 4th day of December, in the year of Our Lord one thousand nine hundred and twenty-two.

Present:

The Honorable OSCAR A. TRIPPET District Judge.

United States of America, Plaintiff,	}	No. 668
vs		
Quong Duck, Defendant.	}	Crim. N. D.

This cause coming on this day for the imposing of sentence on the second count of the Indictment: H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; R. P. Rettalick, Esq., appearing as counsel for the defendant, and having made a statement in mitigation of sentence on behalf of the defendant; and defendant having thereupon been called for the imposing of sentence upon him for the offense of which he now stands convicted, namely: Violation of the Opium Act as amended, and the judgment of the Court is that the defendant pay unto the United States of America a fine in the sum of \$1000.00,

and stand committed to the United States Penitentiary at Leavenworth, Kansas, until said fine is paid or he be discharged by due process of law, and that he be confined in said Penitentiary for the term and period of five (5) years; the sentence of five years imprisonment to begin at the expiration of sentence imposed herein on defendant for non-payment of fine assessed against him; and defendant is thereupon remanded to the custody of the U. S. Marshal, and it is ordered that the narcotics, pipes, etc., be turned over to the Board of Narcotics.

5/487

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN Division.

UNITED STATES OF AMERICA,	}	No. 668 Crim. N.D.
Plaintiff,		
vs.		
Quong Duck Defendant.		

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original JUDGMENT entered in the above -entitled cause; and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said cause.

ATTEST my hand and seal of said District
(Seal) Court, this fifth day of February A. D. 1923

CHAS. N. WILLIAMS Clerk.

By Louis J Somers
Deputy Clerk.

No. 668 Crim. IN THE DISTRICT COURT OF
THE UNITED STATES for the Southern District
of California NORTHERN DIVISION. United
States of America, Plaintiff, vs Quong Duck, Defend-
ant. JUDGMENT ROLL Filed February 5, 1923
Chas N Williams, Clerk By Louis J Somers Deputy
Clerk Recorded Min. Book No. 5 Page 487

THE PEOPLE OF THE)
UNITED STATES OF)
AMERICA,)

vs.

Defendant.)

INDICTMENT FOR

— — — — — X

BE IT REMEMBERED, That the above entitled cause came on for trial on the 28th day of November, 1922, being one of the days of the November Term of said Court, before the Hon. Oscar A. Trippett, one of the judges of said Court, and a jury duly impanelled.

(Testimony of Andrew Roberts.)

Herbert N. Ellis appeared as Counsel for the Government, and R. G. Retallick appeared as Counsel for the Defendant.

The Government to maintain its case offered the following evidence to-wit:

Witness

ANDREW ROBERTS

sworn and examined on behalf of the Plaintiff testified in the following manner:—

I am a Federal Narcotic Inspector and arrested the defendant in this case, Quong Duck at 4:00 P. M. on the 26th day of July, 1922, at 1016 China Alley in the City of Fresno. We procured a search warrant and entered the premises at 1016 China Alley and after some difficulty in entering due to the fact of the secret buzzers and doorways, finally entered the inside room. The door has several latches on it. It is about four inches thick, has a little peek *hold* so that one sitting at a desk with a cord underneath may, if the proper signal is given, pull the cord and open the door. Not having the proper signal we forced the door, and upon entering the premises found the defendant Quong Duck sitting on a stool at a desk with the drawer partly open. He endeavored to close the door and I took him away from the desk. At the time I found Mr. Gee Lee and Mr. J. K. Quon, - Mr. Quon is now in the court room, in the large room. The room was so laid out, it had the usual mats, boards, kind of all around the room."

(Testimony of Andrew Roberts.)

At this point Counsel for defendant objected to the manner in which the witness was testifying, and his objection was allowed. Witness proceeds:—

“There was a sort of platform about three feet in height all around the room and Gee Lee and J. K. Quon, when we first entered were reclining on that platform. I immediately stepped over to Mr. Gee Lee, and by his side was an opium pipe, which was still burning. I took the defendant and brought him over to the other two men, and placed him in charge of a Mr. Anderson who accompanied me in entering with Officer Brown. Mr. Anderson is now in the hospital in the City of Fresno and unable to be here. I asked the two men, Mr. Quon and Mr. Lee, not who was the proprietor, but who was the “bossy man,” which they would understand. *The* both pointed out the defendant. When we first entered, I asked the defendant if he was the “bossy man.” He said: “Other bossy man go away. I bossy man now.” That was before we had found any narcotics. I searched the defendant, and as I went to search him over part of his body, he had one hand in his pocket, and he dropped two keys through his pants. I saw it going down and got it as it reached the floor when he went to put his foot over on it. I asked him if those were his keys. He made no answer. I then told him, I says: “we found no opium yet.” “Oh,” he says, “yes, those are my keys.” Then we searched the premises thoroughly. Those keys we fitted to the front door and the door between. We searched the main room,

(Testimony of Andrew Roberts.)

under the flooring and in the walls and behind a lot of rags and different kinds of tins, we found quantities of yenshee. We searched the drawer that he had open when we entered and we found a small jar of opium. We searched the back rooms and we found concealed under other rags some yenshee. Here (producing a package) are the pipes which were on the platform around the room. This pipe to which the opium is still adhering is the pipe that was used by one of the men, Gee Lee, it was right next to him - the opium pipe. All these pipes are in the course of construction. These are called gee hocks, used for cleaning opium pipes. I have the opium and yenshee there and will bring it."

Here the witness produced opium and yenshee, which was stipulated to be opium and yenshee by Counsel for defendant. Witness produces a suitcase and proceeds:

"This is an opium lamp. These are opium bowls found in the main room, and these are gee hocks for cleaning pipes. Opium lamps used for cooking. This little can was for the residue, is still attached, still adhering to the sides. Parts of opium lamps. These are what is known as gee rags for cleaning pipes. Parts of lamps. These are decks of cards. This deck of cards upon which the residue of the opium is still adhering, which is sold at so much a card. There is a whole deck there. It is sold at so much a card to the opium fiends. Parts of opium pipes and cleaners. These are used to place the warm opium when it is

(Testimony of Andrew Roberts.)

about to be used. This is a quantity of yenshee, this was found with a quantity of opium in the drawer at the time we entered, - where the defendant sat."

Here the yenshee is shown to the jury.

"These are some more pots of opium lamps. These two smaller bowls were found in the outside room concealed under a lot of rags and tins. There is a room in back of the main room. These two here. There is yenshee in these two packages. Yenshee is the residue of opium which has been smoked, a preparation of opium. They smoke it again, your Honor. Then they smoke it again, sometimes, the third time, but this has been smoked unless it is a good quality of yenshee. This is also yenshee that was also found in the room back of the main room.

There is a passageway from the main room into that room. Then you turned a couple of times and got into it. There was a door between and it was open. Just a sort of anteroom to the main room. The main room was the room we entered. I have some more stuff here. These are the keys which the defendant dropped through his pocket and on to the floor, which I picked up as it was reaching the floor, as it went through his pants. They fit the premises, fit the front room also the door between. The premises is 1016 China Alley. We tried the keys in the presence of the defendant after he admitted they were his keys, and then he denied after they fitted that they were his keys. This is a quantity of yenshee that was found concealed under a lot of rags."

(Testimony of Andrew Roberts.)

MR. ELLIS: I think in view of the stipulation it is opium and yenshee that we can pass that up. I ask they be received in evidence.

THE COURT: Let them be marked in evidence.

MR. ELLIS: The suitcase and contents being marked Exhibit 1. (Said suitcase and contents received in evidence and marked U. S. Exhibit No. 1.)

MR. RETALLICK: I wish to have an objection interposed to the ruling on the ground it is incompetent, irrelevant and immaterial; that no connection has been shown between the defendant and the exhibits offered.

MR. ELLIS: It was all taken right from the premises of the defendant.

THE COURT: That is all true.

Exception No. 1.

MR. ELLIS: The grand jury is ready to report now, your Honor.

THE COURT: Let the Marshal vacate the first two rows of seats on the side. Proceed with the trial Mr. Ellis.

MR. ELLIS: Now, was anyone else with you there?

"Narcotic Agent Brown was with me there also. He is now in San Francisco, confined with an infected eye, in the hospital. Mr. Bacon was also with me. He is now in the court room and Mr. Anderson. Mr. Anderson is at the present time in the City of Fresno. After I had found the keys, he then denied that they were his keys; that is after I found the narcotics. I

(Testimony of Andrew Roberts.)

asked the defendant how long he had been conducting this place and he refused to answer."

Counsel for Defendant R. G. Retallick, objected to the following question:

"Did you have any more conversation with the defendant Quong Duck about this stuff?" on the ground that no proper foundation has been laid for it. There has been no questions asked to show whether or not there were any threats made, any inducements or promises or reward, and they appear to be in the nature of confessions.

MR. ELLIS: The objection is well taken. Before you entered the place -- at the time you entered and interviewed him, did you make any threats to him?

"I made no threats, but on the contrary, I told him whatever any statement he made to either Narcotic Agent Brown or myself might be used against him. I promised him no reward or immunity from punishment and so far as I observed these statements were free and voluntary."

Counsel for defendant makes further objection and suggests that it might be shown who was present.

"Narcotic Agent Brown and Mr. Baker were present. Mr. Baker is in court now. I took a hat off the wall, which was right a few feet from the defendant on the right hand side as he sat at the desk, on the wall. I asked him if it was his hat and he said no. I placed the hat on his head and it fitted him. I then handed the hat to one of the other men, the Chinese. I told them as long as it is not the defend-

(Testimony of Andrew Roberts.)

ant's hat you can have it. Then the defendant spoke up and said it was his hat. That was right next to the desk, as I entered the defendant was seated, opposite the doorway, in front of the doorway, out of which I took the Yenshee and small jar of opium within reach of the string which opened the door entering into the smoking room. That is approximately all the conversation which I had with the defendant. The platform which I mentioned was about four feet wide all the way along the two sides of the room. The furth~~er~~ end of the room, towards the room in which I found the other yenshee was a big stove; in that stove were different refuse, one thing and another. From the rooms and under the platform, on the opposite side of the room, under the platform upon which Gee Lee and J. K. Quon were reclining, we found some of the yenshee concealed under some rags beneath the floor. It was what we call a plant. It was tongue and groove flooring, but we could see the places where the boards were loose. We pulled up the boards and found yenshee concealed under the boards. The room was, I should say about 18 x 18. Not a large room. There were--let's see--no, no windows I remember of. There was a partition to which the door which entered into the room was connected, about 7 foot, and then there was a little bit of light over that partition, but the room was apparently dark; it was a room, what we call an inside room; have to keep the lights burning in the daytime. To gain access to this room you had to go through

(Testimony of Andrew Roberts.)

this heavy door. No other way of entering those premises unless you come in by a devious passage near the back, which we couldn't find any way of getting into it except by means of the back door. We don't want to get in the wrong place, it called for 1016 China Alley.

It seems to me this was a one story building. The front part of it is a store with a lot of shelves, lot of empty boxes. No stock carried in there at all. We searched thoroughly in front and found no stock. The neighborhood around there is inhabited by Chinese entirely, it is Chinatown. There was business places on both sides of the street, and this, from the outside, it looks like a business place, and on entering there is no stock in there. We found no stock in there, no goods of any kind I mean. There is a place in back where you might cook food, and we found a lot of empty kitchen utensils, dishes and so forth, all you might say in a condition, they hadn't been used for some time; in fact, things in this place were quite filthy; had to be very careful how we handled them. I didn't see any food except a little bit of rice on the sink."

The last of above was in answer to the following question "Was there any food stuff there?"

MR. RETALLICK: We object to that question; immaterial whether or not there was food.

THE COURT: Objection overruled.

Exception No. 2.

MR. ELLIS: Did the defendant accompany you on your search?

(Testimony of Andrew Roberts.)

"The defendant did not accompany me in the search of the back room, but he was personally present when I searched the large room, and the front room. He was detained in the center or large room, ~~and~~ with his two visitors which we also arrested. We saw several places, hidden crevices in the walls, and places, which showed evidences of having been used for caches or plants of narcotics."

Mr. Retallick, counsel for Defendant asks that the last be stricken out to which the court consents.

"The wall, upon sounding it, it would *found* that there was a loose tongue and groove board, and on prying that open and reaching your hand in, and using your flash light, you found where there was a little partitioned place across for the purpose of holding - -

Mr. Retallick asks that it all be stricken out, to let the witness tell what he found, to which the court answered that he should tell what he found there, not what he did.

"On the platform which is built around the room, there were sleeping blocks; their sleeping block is made out of a square piece, that is oblong piece of wood about 12 to 14 inches in length, about six inches in height, about four inches in thickness, which is carved out in a half circle, so that one may, if they wish to recline that way, may put their head in - -"

Mr. Retallick objects again saying that the first is all right, and the court states the block is all right but for the witness to leave out his opinion.

(Testimony of Andrew Roberts.)

"Under the platform, on the right hand side as we entered the room, concealed by the platform, under a lot of rags and tins and different kinds of things, by pulling out those rags, we found two or three tongue and groove boards, which were loose. On prying that up, we found more rags, and by flashing our flash lights in there and pulling out those rags, ~~and by flashing~~ we found yenshee concealed under those rags in the front room. That opening was about 14 x 16 inches, but it extended for some six or seven inches underneath, so you have to put your arm under the tongue and groove. I put my arm under and pulled out the rags and different papers, and found the package of yenshee concealed there. This was the one opening leading into this place through which you would be obliged to put your arm to extract anything from it. It was a little receptacle underneath.

These openings were different sizes. We found them in the walls of the place; in fact in the front, in the store, we found some places which were what we would call false walls, and on the left alongside, near the desk at which the defendant sat, we found a couple of loose boards; it was a little bit large place underneath; I won't express my opinion, it is quite a large place under there. I should say it ran along a couple of feet underneath between the hoists; the joists were severed under there so you could run under *father* than the usual distance between joists. The tongue and groove was over this opening. By pulling

(Testimony of Andrew Roberts.)

up this tongue and groove -- There was just the second flooring underneath with a lot of papers laid on the bottom, and then a lot of cards, and pieces of boards that are found in such places, in those caches."

MR. ELLIS: Now, was there anything on the outside of these openings, fastenings of any kind to indicate there was anything in there?

A. No.

MR. RETALLICK: I object to the question, leading and suggestive.

A. No there was nothing.

THE COURT: Overruled.

Exception No. 3.

A. The tongue and groove boards were very closely fitted together.

MR. RETALLICK: I object. That is not an answer to any question.

THE COURT: Overruled. You have the description of this place enough.

MR. ELLIS: I think so then.

MR. RETALLICK: May we have an adjournment for about two minutes. I don't like to stop in the middle of my cross examination.

THE COURT: Well, remember the admonition, gentlemen, heretofore given you. Take a recess for two minutes.

After recess Mr. Retallick requests that the blackboard be brought forward, and proceeds with his cross examination of the witness.

Witness is called forward to draw floor plan.

(Testimony of Andrew Roberts.)

MR. RETALLICK: Now would you come to the blackboard and give the jury an idea of the floor plan of this place? (Witness proceeds to draw.

"This would have to be inverted, 1016 is on the right hand side of China Alley. This store 1016 China Alley, two doors. The dividing door, that is the center there. You enter that door, you turn to your left as you enter I found a passageway leading to a large solid door, about four inches thick, and in that door is a peek hole about four inches square. I have to figure out just how you go in there."

The court object to witness taking the time of the jury to make the plan and states that it will sustain an objection to so doing. Mr. Ellis makes such objection but it is not acted upon and Mr. Retallick proceeds with rough plan, assisted with suggestions from the witness.

"The store room is in front there, that is what purports to be a store room in front, and it was from all appearances. From the back end of the store there is a little narrow passageway which you might call a hallway, and yes there is a small room on the side there. Also there is wainscoating along this side of that small room if my memory serves me correctly. We tore out some of the wainscoating. We didn't find any opium there but found a plant where there had been opium. Found a place where the boards were loose; pulled out those boards and found a receptacle, but didn't find any opium or its derivatives there. There is a heavy door, which I have

(Testimony of Andrew Roberts.)

described to the jury, and before you enter the back room you must enter the large room. You don't go through the hall way there no, turn to your left and you find yourself confronted by a four inch door there. Have to turn to your left, through a small room, through the passageway, you are confronted with a heavy door. You couldn't go from that small room into the large room. This room here is where I found the Chinamen.

I found all this stuff concealed under the right hand side; there was a platform running around down this side and running down this side. We found a place, loose boards there. We found in the drawer of the little desk, which is right directly as you come in, after you come around from that large door, found the jar of opium. Found the jar of opium in the little drawer, also found the jar of yenshee, and found a package of yenshee under this platform, under some boards, some tongue and grooved boards, which were closely fitted up. No, not all of that stuff with the exception of the pipes were concealed in these various concealing places, the gee rags and the gee hocks and the pipe cleaners, bowls and some of that weren't concealed. The jar of yenshee and the jar of opium were behind some other packages in the drawer concealed. The drawer was in front of the defendant when we entered. He was seated at a little desk with his hat off. The drawer was in -- you can't call it a desk. It was a little counter, and that drawer had a lock

(Testimony of Andrew Roberts.)

on it; it wasn't locked, it was partly opened, and the defendant, as I testified, tried to close that drawer.

I was not the head of this expedition, there was no head, Mr. Brown and myself worked in conjunction. With me were Mr. Brown; Mr. Baker and Mr. Anderson."

Mr. Ellis objected to the question as to whether they went in there suddenly, on the ground that it calls for the conclusion of the witness.

"We went into the front door rapidly. We found it necessary to force the large door, which we could not get in without forcing the larger door. Both of us tried the door and neither of us could open it without forcing it. Both of us tried the second door. In the immediate presence of these men there were three Chinese, Gee Lee J. K. Quon and the defendant Quong Duck. We only found in their immediate presence one pipe, also these two here and the gee hocks and gee rags, and these lamps were also found in the presence of the defendant, and the lamp chimneys, and the yenshee. Unhidden and in plain sight out there ~~you~~ we found the pipe, next to Gee Lee, on the platform, not next to the defendant as the defendant was seated at the desk.

The only hat in the premises was the hat on the wall which fitted the defendant, and which he afterwards admitted was his. It is an imitation panama.

"Yenshee is opium that has been smoked, once, and it is sold then for smoking purposes. I can tell by looking at it whether it has been smoked more than

(Testimony of Andrew Roberts.)

once or not. That is yenshee; in other words, it is yenshee or another Chinese name, which I can't pronounce, which means it has been smoked over once, been smoked over once, but yenshee has only been smoked once. That has only been smoked once. I can tell by a fire test, burn it to get the fumes, also by the feel and by the smell. An opium joint usually has opium and gum opium for smoking, and the yenshee, that is for the poorer class of trade.

Narcotic Agent Brown was with me, he is now in the hospital with an infected eye. He is at San Francisco at the Morton Sanitarium. He has been in and out of it two or three times. His eye seems to get better and then the cold sets in and he goes back again. He doesn't merely go there for treatment, he is actually in the hospital and was there when I left the city some days ago. He may possibly have gone home by this time. Mr. Baker was with me and he is in court now. Mr. Anderson is a resident of the City of Fresno, Mr. Baker can tell where he lives, he is a brother-in-law of Bakers. According to what I found out this morning he is also in the hospital. Mr. Baker could inform you what hospital he is in.

I have been a Narcotic Agent for some time. Fresno has been part of my territory. Take in five states, and I have been down here numerous times. I knew nothing about any arrests made by the police and knew nothing of what had been done by the police.

There were four of us altogether. I questioned the defendant in the presence of the other gentlemen;

(Testimony of Guy Baker.)

some of the questions Mr. Baker didn't hear, because he was assisting Narcotic Agent Brown in the outside rooms, while I was questioning the defendant in the presence of Mr. Anderson. The first thing I did when I got in the room where the Chinese were was to take the defendant away from the drawer, which he was trying to close. I brought him over to the other two, Gee Lee and J. K. Quon so there couldn't be any interference and handcuffed them together. As soon as we came in we saw the pipe and smelled the fumes was the fumes of opium. The conversation I had with the defendant was after I had already handcuffed him. There was absolutely no threats made against this defendant, or some other Chinese there. We did Arrest the other two Chinamen charged them under the state law with visiting an opium joint."

Witness Roberts was then dismissed and Witness

GUY BAKER

called, sworn, and examined as a witness on behalf of the Plaintiff, and testified as follows:

"My name is Buy Baker and I live in Fresno. I went with Mr. Roberts to 1016 China Alley, that was the first time I was there. We forced the front door. Mr. Brown and Mr. Roberts told Mr. Anderson and myself to watch the front door and not let anyone out, and then pretty soon, about five minutes after they called us into the other room. These two Chinamen were handcuffed there together. I did not hear any conversation at the time, and not until after they found

(Testimony of Guy Baker.)

the keys. I was there when they found the keys. They found them at Quong Duck's feet and he was standing up. I saw Mr. Roberts pick up these keys and heard him ask the defendant if they belonged to him; I think he said no. He said, no, anyway. I went and tried the keys and found they fitted the door and after that I gave them back to Mr. Brown or Mr. Roberts. I did not hear anything said to the defendant about these keys fitting the door or about what he was doing there. I heard the defendant deny owning the hat and the keys; that was about all I heard from him.

I first went into the room, the first thing I saw was Mr. Roberts stoop over and pick up the keys. He asked Quong Duck if they belonged to him and he said no. Then he had me try the keys, and I came back and told him that they fitted. I told him in the presence of the defendant. Then after he said they didn't belong to him, Mr. Roberts kept the keys to see - - . After Mr. Brown had found the pipe, I suppose found it when they went in the first place. I didn't see him pick it up. I saw them find those rags he spoke about under the floor. I saw some yenshee there, wrapped up in rags. I didn't see any opium. I wouldn't know it if I saw it anyhow. My first experience. All that stuff there was in there. The cards were in the drawer in the desk, I saw them, and the stuff on the cards as it is now. We didn't stay in the room where these three men were handcuffed together, Mr. Brown and myself went into the front

(Testimony of Guy Baker.)

room and was searching in there. We didn't find anything. Then we went back into the large room, and searched there but didn't find any more after that that I saw. I don't remember much about it at all, it was my first experience and I was nervous.

I saw where the opium was found, under the bed on the platform, I don't know what you call it, on the south side of the room, in a little place they call plants, and they broke the boards and reached underneath and pulled out the rags. It was in the floor, a part of the floor where this opening was, and they found the loose boards there and pried those open and found these rags underneath. There were about three or four of such places there. I didn't hear the defendant say anything more about the keys."

Mr. Retallick objected to the question of whether or not witness heard him say they belonged to him on the ground that it was leading and suggestive and objection was sustained.

"No one went with me to the door to fit the keys. The defendant was in the large room. I had to go through the little passage then out to the front; I told Mr. Roberts they keys fit, I whispered it to him and then he told Quong Duck they didn't fit then Quong Duck owned up they were his. Mr. Roberts said it loud enough so that I heard what he said to Quong Duck. Quong Duck spoke broken English. All I remember now I have stated. Right at the time I was nervous when I went in there; I was new, I didn't know what was going to happen; I remember seeing

(Testimony of Guy Baker.)

the hat there, that was the only hat I saw. A straw Panama hat. He said it didn't belong to him. I heard that much. That was right after they found the keys that he first spoke about the hat to me; after they found it, and then this hat was hanging on the wall to the north of the room. The other men there did not claim the hat. After the other fellows were going to take the hat he admitted that it was his hat."

Upon cross examination conducted by Mr. Retallick, counsel for the defendant, the witness Guy Baker testified as follows:

"There were more keys tried in the doors than those two. Some of the Chinese present handed them keys and they were tried in the door. Mr. Roberts asked for their keys. He found the defendant's keys at his feet. He also asked him for some keys. Both of the Chinese handed him keys, and they were tried but didn't fit. Afterwards the keys that were found on the floor were tried and those were the keys that fitted. I saw the defendant trying to cover the keys with his feet, tried to get them under his feet, stand with both feet together. The first time I saw them they weren't on the floor, down between. Mr. Roberts picked them out of there, I don't know how they got there. I didn't see them very clearly before he picked them up. I saw him pick them from his feet. Just reached over and picked them up there and held them by the string. Picked them up very close to his feet. They were on his feet, not between his shoes. Standing with his feet together he tried to drop them

(Testimony of Guy Baker.)

in between. I saw them in between his feet. The front door was all I went through until after they had these other three handcuffed. Along towards the last everything was pulled down from the shelves and a very thorough search made, that was the last thing they did. The last thing was to search the front room. The first thing that was done was to search the room where the Chinamen were and in the course of the search everything was pulled down on the floor. There was a lot of junk there, old cans, old rags, old sacks and stuff that is junk and nothing else pulled down and scattered over the floor in the course of the search. One of the men stood by these Chinamen after they were handcuffed. No one, myself or any man present, threatened these Chinese, nor did they use any rough language to them whatsoever. Not exactly polite language, but it wasn't rough, and no threats were made. I am sure there were no threats made, just questioned them. All the conversation had was had after this defendant and the other men there had been handcuffed together."

Mr. Retallick dismisses the witness and Mr. Ellis the counsel for plaintiff exhibits the keys (part of U. S. Exhibit 1) to witness.

"Yes, those are the keys I tried that fit the door there, and they are the keys concerning which I testified that I saw at the feet of the defendant. He picked them up right in that way."

THE COURT: Hand those keys to the jury, they may want to look at them.

MR. ELLIS: The United States rests.

(Testimony of Gee King Quon.)

DEFENSE.

GEE KING QUON

called, sworn and examined as a witness on behalf of defendant, testified as follows:

"My name is Gee King Quon. I come to this County in July 23, 1922. I lived at Oakland before I come here. I come over, I live in hotel - - what you call that street - - Tulare Street. I do laundry business for a living. I was in this place at 1016 China Alley on the 29th day of July when this defendant was arrested. I passed the China alley and I see my friend Sing Kee, and he stand out in front his store, outside his door, and he say to me, "Gee King Quon when you come in this town?" I say "I come in this town about four days." I says: "Such a hot day." He says: "Yes, hot day, but you come in and get rest." I says: "What you do inside?" He says: "Nothing to do, but empty house."

Upon Mr. Ellis' objection that the above is not competent, Mr. Retallick consents and asks more directly, his question as to who he went in the house with.

"I went in with Sing Kee. The man I just spoke about that I was talking to was Sing Kee. When I got into the house that man (meaning defendant) was not there. I go in there talk Sing Kee just a few words, and another man, his name Gee Lee, he come right in the house, he know me before too. He say, "Well, Gee King Quon, when you come in?" I say:

(Testimony of Gee King Quon.)

I just come about four days," and he says: "I want talk to you." He said "Sit down, you just wait a minute, I go over to water closet, I come back and talk to you." I say: "All right, I wait for him." Then he go right in the water closet. That was Gee Lee did that. And, after that, man come in the house and talk to Sing Kee. Sing Kee talk to him just a few words, then Sing Kee says: "You just sit down here, wait for me, I just come back a little while." I say: "All right, I wait for you." Then Sing Kee went out with old man. Afterwards Quong Duck comes in after me. He says: "Well, one of friends is in the house, he want see you." I say: "Well, I want see Gee Lee first before I go, you just wait a minute, then I go with you." Then he sat down, Quong Duck sat down there too. Then the officers come right in the house, in the room. I see them. I don't know what he do. Some had axes, and one is come into me and just hold me hard, and smell anything like that. I say: "What's the matter?" He say: I tell you anything about matter." He wouldn't tell me anything then, so then he hold my right hand, and take handcuff and lock me up, and take Quong Duck's left hand and lock it together, and then Gee Lee come out of water closet--that officer lock me up and Quong Duck up and just go after Gee Lee and bring Gee Lee up and lock my left hand on Gee Lee's right hand and then told me stand up, and just put his hands on my pocket, and over on Quong Duck's pocket and on Gee Lee's pocket."

(Testimony of Gee King Quon.)

"After officers handcuffed, then he told me sit down. I said "What you want?" He said "I going tell you after while." Then he told another man take the chair sit down in front of me and watch us. Then the rest of the men to in the room, and find for everything, and turn everything over and break everything up, and find something and go upstairs and look and find nothing in the room. And then they go down in basement and break everything, and come up, couldn't find anything; and do the worst; then they go out the front part of the house and break everything. He puts something, I don't know what he find, they take them in boxes. I couldn't see what they were doing in the front room, I was in this room there. Couldn't see outside what he done. I don't see what they find, but when he get Gee Lee, and Gee Lee ask "what's the matter, you going lock me up," he says "You just keep quiet. Don't you keep quiet, I just knock your head. I break your head," and Gee Lee talk to him, he hit him hard, and Gee Lee get cry. I told Gee Lee: "You just might as well -- No, not this man did that, the other man. The other man no come I don't see him today. That fellow he hit him. I thought the officers all --"

Here Mr. Ellis objects and same is consented to by Mr. Retallick, counsel for defendant and witness proceeds.

"No, they did not first take some keys from my pocket. I see him take keys after he got finished almost, and then he found out the key on the floor, and

(Testimony of Gee King Quon.)

he ask me: "That is your key?" I say no. He ask Quong Duck, he says no. He ask Gee Lee, he says no. Then he take the key around and try the door, and he come back, "This key no good, who belong to?" and nobody answer, then he put it in his pocket. I didn't see anything else in the room, nothing against the wall in the room. I never see anything the officers pick up. I never see with my eye. I am friend of defendant. I live in his hotel."

Upon

CROSS-EXAMINATION

conducted by counsel for the plaintiff, Mr. Ellis, witness testified as follows:

"Well, I did not see hole in the floor in this place. The floor is very clean, but this officer come and break everything all over the floor. I saw where they took the boards out of the floor, the hole in the floor. I see place where the China boy lay down around room, sure, and I see hole in the floor. I didn't see him pull something no, I see hole down basement all right. I don't see blocks on the platform. No blocks -- what you mean blocks, Oh, I know what you mean, blocks. Yes, yes, I see them blocks too. I did not see opium pipe there. I didn't see that pipe there, I never see that before there. That is lamp, I never see that before. They use that lamp all kind of way, any kind of use. Yes, you can light up and just look out, anything you can use it. I smell oil, nothing else. No, can't smell anything but oil there. I know

(Testimony of Gee King Quon.)

what opium is, I never smell any that night, never seen one other thing.

I know what that is too, it is used for smoking, but I don't see any in there. That is used for smoking opium. That—I don't know what that is, never see anything like that but it smell like opium. Don't know what that is used for, didn't see any there that night.

That stuff, I can't smell that. It is funny. I don't know what is in that. I have seen yenshee, but I don't see any that night because he never find anything in the room. That is all, I tell you. I wouldn't like at all. He never find anything. I saw. He never show me anything he find on that day. He never taken up any from that hole, never did. He never get anything in that drawer there. I saw him. Never taken out one thing against the law. Mean anything like that. Stuff like that, against the law. Opium against the law. I no see anyone smoke there that night. No smoke when officers came in. The door wide open, they come in before I know it. Never used the axe before he come in. He never broke the door. The door was open, come right in. He just take the axe and break the floors, break open part of house. He never touched the door. The door was never bream. Door was open. Wide open, I go in there, wide open he come in, wide open. I saw the string, but string was not used that day. I don't know the bell. I didn't pay attention to bell. I see the string and the string it tied up, and door is open.

This other friend, Sing Kee: I always know him.

(Testimony of Frank Truax.)

He don't live there now. I don't see him. When I come in I talk to him. I see him. I know Quong Duck before too. I don't know what room is used for. When I come in, empty room that is all. Quong Duck come after me. Nobody in there when I went in, Just me Sing Kee, Sing Kee ask me to go in. I don't know what he use the platform for, I didn't pay any attention to that at all. I never been in opium joint in my life, never smoke in my life. The bed was there, not the kind we sleep on, I see the bed all right, but I don't know what he use that bed for. They are big, different. I don't know what these round blocks are for, I never use that kind of block myself. I don't know what he use them for. I never see one used. I no heard; I don't see what they are used for."

Witness dismissed, and

FRANK TRUAX,

called, sworn and examined as a witness on behalf of Defendant, testified as follows:

"I am Frank Truax, Chief of Police of the City of Fresno. I have been Chief for some years last past and am acquainted with Fresno's Chinatown. In particular I am acquainted with a place known as 1016 China Alley. In that place designated here on this map, that is the store room in front, back room, hallway here, small room on the side. I don't think the proportions of the building are right. The back room is not so large, probably, the front room is not quite

(Testimony of Frank Truax.)

so large; the middle room is the -- yes, the place had been used as an opium joint for a great many years."

Mr. Ellis objected to the question of the place being used as an opium joint for many years, as being leading and suggestive, but question was allowed and answered.

"On the 4th of July I raided the place, and was personally present. There was other officers with me."

Mr. Ellis, counsel for Plaintiff objects to this testimony as being wholly immaterial, two weeks or three weeks before the time of this raid, but court overrules with the statement that the jury will be glad to know that the officers regarded it as an opium joint.

"At that time one of the men arrested by me, was arrested as proprietor of the place. He was there then."

Mr. Ellis objects to last above as being incompetent, irrelevant and immaterial which objection is sustained. Witness proceeds:

"I don't know whether or not the place had been reopened after that time or not. At the time I arrested the men, personally, this defendant was not in there. He wasn't around there. He wasn't one of the men arrested. There were three or four got away, five or six but I didn't see him."

Upon

CROSS-EXAMINATION,

conducted by Mr. Ellis, counsel for Plaintiff, witness testifies as follows:

"I know this defendant by sight. I have seen him

(Testimony of Quong Duck.)

there a good many times in Chinatown. I don't know what his business is, I know his father pretty well. His father runs a store over there, a grocery store. I don't remember that there were two men charged with visiting an opium joint on July 23rd, under your jurisdiction July 23rd or 22nd. I don't remember about the case, no sir. I probably have on my books; I don't recall it, I didn't look it up. I don't know of my own knowledge. I knew this place was raided by government officers or Federal officers in the month of July after we had raided it in July. Also, I know it was raided twice in July, one time the federal officers raided it."

Frank Truax is dismissed and

QUONG DUCK

is called, sworn and examined as a witness in his own behalf, and testified as follows: through an interpreter.

(Albert H. Wong is duly sworn, to translate the English language into the Chinese and vice Versa.)

"My name is Quong Duck, the defendant in this case. I am at 1016 China Alley on July 26th, 1922, looking for somebody. I am looking for party of name of Gee King Quon. He is inside. He is Chinese witness that testified few minutes ago. I have a little conversation with them after I got in there. After this, little second, officers come right in, and I was arrested. I never notice any opium in there, or anything around the place. I didn't see anything inside

(Testimony of Quong Duck.)

the room there. The room, it is all kinds of cans and garbage around the place. I heard the noise from some officers searching the front portion of the house. I didn't see them. On that day I did not have the keys to that place in my pocket, I see them pick it up from the floor, it was picked up about a foot from where I stand. Yes, it was close to my feet. The officers searched me before those keys were found. They took some keys out of my pocket. Those keys were taken out towards the front of the building to try them and then turned back to me. The keys had a ring to it. There were keys taken from two Chinese there, and they were taken away towards the front of the building to be tried. They tried Gee King Quon's keys first, the party that was a witness. I am the last one. First one Gee Lee; next, party who was witness, and me last man to be tried. I am sure about that. I did have a hat with me, a straw hat."

Upon cross-examination, conducted by Mr. Ellis, counsel for Plaintiff, the witness testified as follows, to-wit:

"I did not *hand* up this straw hat in the room, I had it on my head all the time. All rest -- some had their hat on. I had my coat on, the rest had coat on just the same. I am sure my coat wasn't hanging on the wall with the hat. I don't know whose hat was hanging on the wall. I don't remember seeing an officer take the hat off the wall. Yes, I saw that opium pipe. It was not there that night. I didn't see it there. That is a pipe an opium pipe. I did not see those pieces

(Testimony of Quong Duck.)

of pipe there that night, never saw them any place and never saw that pipe there. Never saw any of that stuff that is here, or these lamps.

I can't smell that, I don't smell anything, and I don't know what that is used for, that wire like that. I never saw anyone clean an opium pipe with a wire like that. (looking into pipe) I see a drop in there, I don't know what it is. I don't know whether or not it is opium. It looks like opium, I know what opium is. I never saw anything like that yenshee there that night when I was arrested, the officers didn't show me any. The officer didn't show me anything at all, had it wrapped together. I didn't see him find that stuff in there."

Mr. Retallick, counsel for defendant objects to the following question that "Did he tell you--did you know he found any there at all?" on the ground that it is incompetent, irrelevant and immaterial, and the objection was overruled.

"I know there was opium found there that day, or yenshee. I remember officer was searching, holding things up: I don't know what he find. I see him bring it out, all this stuff. He hold all these things, officer didn't show any of this stuff; all put in together. Did not see any opium or yenshee that the officer put all together in a box."

Mr. Retallick objects to the following question "How did you know there was any yenshee or any opium there then?" on the ground it has already been asked and answered. Mr. Ellis answered that it hadn't been

(Testimony of Quong Duck.)

answered, and the objection was overruled. The witness proceeds.

"The officers, I never notice any opium, what he have or not. I was arrested on account of things, what he had these things; found out was going to arrest me; it is against the law. Officer told me all these things are against the law and he was going to arrest me for that. Never see those keys, I see him pick them up off the floor. I don't know if these keys fit the place where I was. When I went in the door was open.

I live at 1511 Tulare Street, Fresno. I did not see anybody smoking there that night, or that afternoon when I was arrested and did not smell any opium in the place, when I was there. Sing Kee owned that place, and he was not there when I was there. I don't know where he is now. I did not tell the officer he was away, had gone to China. I did not tell him the "bossy man" had gone to China."

Here a recess is taken. After recess proceed without the interpreter.

"I had been in house about five minutes before officers came." Here the interpreter is called to explain the question "Did you know this door, this room which he was in had an extra thick door.

"Yes I noticed the door."

MR. ELLIS: Did you notice that the one leading into the room where you were was bigger than the outside door?

MR. RETALLICK: Just a minute. If Your

(Testimony of Quong Duck.)

Honor please, for the purpose of the record at least, I wish to interpose an objection to this line of questioning as incompetent, irrelevant and immaterial; along that line, I desire to suggest to the Court that the charge here is not visiting a place or resort for the purpose of using opium, but for having possession or receiving or buying or facilitating - -

THE COURT: How does that tend to prove anything.

MR. ELLIS: If he doesn't know anything about what was going on in this place, what he was doing, why he entered this place in which he was, he may not know anything about it; I am trying to find out. He says he didn't know this stuff was there until the officers showed it to him. I am trying to find out if he knew anything about the place.

THE COURT: I will overrule the objection. He may answer. (Question read)

Exception No. 4.

A. I don't know which was the bigger.

MR. ELLIS: Q. Did you see the rope that was attached to this door?

MR. RETALLICK: Same objection, if your Honor please, on the grounds previously stated, incompetent, irrelevant and immaterial, and for the same reason.

THE COURT: Objection overruled.

MR. RETALLICK: I understand I have to take an exception.

Exception No. 5.

THE COURT: All right, it may go in.

(Testimony of Quong Duck.)

MR. ELLIS: Q. The rope or cord? A. I don't know where that rope is.

THE COURT: Were you ever in that place before?

"I was never in that place before. That is the first time I was ever there. I have lived here in Fresno about ten years, down in Chinatown but was never in that place before. I go look for a man this time, the man that testified, did not go in there for anything else. When the officers came in I was sitting down. Sitting there well, because sitting down see what happened."

THE COURT: Proceed, Mr. Ellis.

MR. ELLIS: Did you know what kind of a place that was before you went there?

"I don't know what that place is. I had my hat on when these officers came in and had my coat on too.

MR. RETALLICK: Q. You have a lodging house nearby on Tulare Street, have you not?

A. Yes, sir.

"My business is running this lodging house, hotel. That was about one block from this place on China Alley."

MR. ELLIS: Q. Is that your place or your father's place you are talking about now? A. This lodging house?

Q. Yes. A. I own that place, not my father's place.

Q. Did you tell the officers at the time you were

(Testimony of Quong Duck.)

arrested it was your father's place, this lodging house was? A. I never had such answer; it is my own.

THE COURT: On the 4th day of July, did you hear about them arresting a lot of Chinamen for being in an opium place? A. I heard about it.

Q. Didn't you know where they were arrested? A. Sure. I just went in the place looking for my friend. I never knew place going to be raided.

Q. Didn't you hear about these Chinamen being arrested there on the 4th of July in an opium joint? A. I heard the place was been arrested, July time; after I heard my friends, the place never been running at all.

THE COURT: Anything further, gentlemen. Proceed.

MR. ELLIS: Q. Didn't you tell the officer in the afternoon when you were arrested, when he asked you where you lived, you said you lived over your father's place, over the lodging house?

MR. RETALLICK: I object to that, that has been asked and answered. I will make a further objection no proper foundation laid for the question. It is a new matter, not brought out on direct examination at all.

THE COURT: Objection overruled. (Question read)

A. No, I never said at all. Q. Never at any time said that? A. No. Q. To this officer right here? A. No.

THE COURT: That all with this witness?

(Testimony of Joseph Barrett.)

MR. RETALLICK: Q. What business is your father in? A. Groceries. Q. Where is that grocery store? A. at 1509 Tulare Street.

Q. How far away from your lodging house? A. Downstairs.

Q. Just downstairs? A. Yes.

Q. Is that lodging house in your name, by the city license? A. Yes.

Q. You understand what I mean by city license? A. Yes.

MR. RETALLICK: That is all.

JOSEPH BARRETT,

called, sworn and examined as a witness on behalf of the defendant, testified as follows:

"My name is Joseph Barrett. I work for the Pacific Gas & Electric Company, and have been working for them for about three years. I was working for them during the month of July, 1922. In connection with my duties with the gas company, I have something to do with the books of account, showing to whom gas is charged for various localities. The gas at the premises designated as 1016 China Alley was charged to Sing Kee, in the month of July, 1922."

Upon cross-examination conducted by Mr. Ellis, counsel for plaintiff, said witness testified as follows:

"I do not know Sing Kee.

THE COURT: I thought the defendant wasn't going to leave here any more; Mr. Retallick, you tell that defendant - - -

(Testimony of Andrew Roberts.)

MR. RETALLICK: I have already explained to him, it would look like I was endeavoring to impose on the court.

THE COURT: If he don't stay inside the bar, I will order him into custody and see that he stays here.

MR. ELLIS: Q. Do you know this man Sing Kee? A. No, sir I do not.

MR. ELLIS: That is all.

THE COURT: Wait a minute. Who collects for the gas? A. We have collectors who take care of that.

Q. You don't know who the collectors are? A. I would be able to tell during that month who collected the bills there.

Q. All you know is what you see on the books? A. Yes, sir. Q. That all you know about it? A. Yes, sir.

Q. Did you ever see this Sing Kee? A. Not to my knowledge.

MR. ELLIS: I ask the testimony be stricken on the ground it is immaterial.

THE COURT: Let it be stricken.

MR. RETALLICK: That is all. That is our case.

— — — O — — —

ANDREW ROBERTS,

Recalled as a witness in rebuttal, having been duly sworn, testified as follows:

MR. ELLIS: Q. When you entered the place where the defendant was arrested, did he have his

(Testimony of Andrew Roberts.)

hat and coat on? A. As I have already stated, he had his hat - -

MR. RETALLICK: I object to that, it is not rebuttal, it is repetition of the testimony in chief.

THE COURT: I don't think it is rebuttal testimony.

MR. ELLIS: I mean, your Honor, only as to the coat; this witness did not speak of the coat; he did testify about the hat, we may withdraw that, he has testified to that.

Q. Did he have his coat on? A. His coat was hanging next to his hat on the wall, as I entered the place, he was in his shirt sleeves; it was very hot on the afternoon of July 26th. He was the only one in the place with his hat off at the time. The other two Chinese had their hats on and coats on.

MR. RETALLICK: No question.

(The case was argued to the jury by respective counsel, after which the instructions of the Court were given to the jury; they thereupon retired to consider of their verdict, later returning with a verdict of guilty.)

The jury returns to the court room at 4:00 P. M. and the following proceedings occur:

THE COURT: Gentlemen of the jury, have you agreed upon a verdict?

THE FOREMAN: We have not, your Honor.

THE COURT: How does the jury stand; I want to know just how you are divided, not as to your vote whether guilty or not.

THE FOREMAN: The jury stands eight to four.

THE COURT: I don't understand, gentlemen of the jury, why a verdict has not been promptly returned in this case. You may retire to your chambers; I hope you will compose your differences, there ought to be a verdict reach in this case. Anything I can do to assist you, I will do it.

Whereupon the jury retires at 4:05 P. M. for further deliberation and at 4:20 P. M. return with the verdict of not guilty on the first count and guilty as charged in the second count of the indictment.

Exceptions 9 and 10.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

THE PEOPLE OF THE UNITED)
STATES OF AMERICA,)
	Plaintiff.)
)
vs.)
Quong Duck,)
	Defendant.)

x

It is hereby stipulated that the foregoing Bill of Exceptions, as amended, may be allowed and settled by the Court.

Dated: March 16 1923.

Joseph C. Burke

U. S. DISTRICT ATTORNEY.

R. G. Retallick

M. G. Gallaher

ATTORNEY FOR DEFENDANT.

The foregoing Bill of Exceptions is certified to and allowed as correct this 16 day of March, 1923.

Trippet

JUDGE OF THE U. S. DISTRICT COURT.

[Endorsed]: 668 Cr. IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION. THE PEOPLE OF THE UNITED STATES OF AMERICA, Plaintiff. vs QUONG DUCK, Defendant. Engrossed AMENDED BILL OF EXCEPTIONS R. G. RETALLICK ATTORNEY-AT-LAW BRIX BUILDING FRESNO, CALIFORNIA. FILED Mar 16 1923 Chas. N. Williams, Clerk Murray E. Wire Deputy

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DIVISION OF THE SOUTHERN DISTRICT.

UNITED STATES OF AMERICA,)	
	Plaintiff,)
vs.) ASSIGNMENT
QUONG DUCK,)	<u>OF ERRORS.</u>
Defendant.)	

Now comes Quong Duck, the plaintiff in error, and in connection with his petition for a Writ of Error, says that in the record, proceedings, and judgment aforesaid, error has intervened to his prejudice, to-wit:

1. The Honorable Oscar A. Trippett, Judge of the Court of the United States aforesaid, erred in overruling the objection of the defendant by his counsel to the introduction of a certain suit-case and contents

which was, over the objection of the defendant, received in evidence on the trial of this action, and was and is marked "Government Exhibit No. 1."

2. The said Honorable Oscar A. Trippett, Judge of said District Court of the United States erred in admitting the testimony and evidence of witness Andrew Roberts that he, the said witness, did not see any food except a little bit of rice on the sink in the house in which the defendant, Quong Duck was arrested, to the admission of which evidence the defendant objected.

3. That the Honorable Oscar A. Trippett, Judge of said District Court, erred in overruling the objection of defendant's counsel to the question propounded to witness Roberts as follows: "Now, was there anything on the outside of these openings, fastenings of any kind to indicate there was anything in there?"

4. That the Honorable Oscar A. Trippett, Judge of said District Court, erred in overruling the objection of the defendant by his counsel to the question propounded to Quong Duck, the defendant, "Did you notice that the one leading into the room where you were was bigger than the outside door?"

5. That the said Oscar A. Trippett, Judge of said District Court, erred in overruling the objection of defendant to the question propounded by the United States Attorney to the witness Quong Duck, defendant, "Did you see the rope that was attached to this door?"

6. That the Honorable Oscar A. Trippett, said Judge of said District Court, erred in stating to the jury when the said jury was first returned into court

and reported that said jury could not agree upon a verdict, the following, "How does the jury stand; I want to know just how you are divided, not as to your vote whether guilty or not?"

7. That said Honorable Oscar A. Trippett, said Judge of said District Court erred in stating to the jury at the same time as specified in assignment No. 6 hereof, "I don't understand, gentlemen of the jury, why a verdict has not been promptly returned in this case. You may retire to your chambers; I hope you will compose your differences, there ought to be a verdict reached in this case."

8. That said Honorable Oscar A. Trippett, Judge of said District Court erred in submitting the question of the guilt or innocence of the defendant, Quong Duck, upon the first count in the indictment herein, to the jury.

9. That said Honorable Oscar A. Trippett, Judge of said District Court aforesaid, erred in submitting to the jury the question of the guilt or innocence of the defendant, Quong Duck upon the second count in the indictment.

10. That the said Honorable Oscar A. Trippett, Judge of said District Court aforesaid, erred in pronouncing sentence and judgment upon the defendant Quong Duck, upon the verdict returned by the jury of guilty upon the second count.

11. That there was no evidence whatsoever introduced on the trial of said action that proved or had any tendency whatever to prove that the defendant, Quong Duck, had possession or control of or knew of

the existence of any opium or opium derivatives found by the Federal officers who arrested the said defendant, and there was no evidence whatsoever proving or having any tendency whatsoever to prove that the defendant had any control, charge or domination of or interest in the building in which the said defendant was arrested, and there was no evidence proving or tending to prove that the defendant Quong Duck knew of the existence of any opium or opium derivatives procured in said building herein mentioned, by the officers who arrested the defendant, or knew of the existence of any opium or opium derivatives at all, and there was no evidence proving or tending to prove that the defendant Quong Duck did either facilitate the transportation or facilitate the concealment or facilitate the sale of opium prepared for smoking, and of yen shee, or of either of said substances; and there was no evidence proving or tending to prove that Quong Duck had any connection or relation to or with the opium or yen shee or either thereof that was in said building in which said defendant was arrested, and there is no evidence proving or tending to prove that the defendant, Quong Duck, knew of the existence or the concealment of said opium or said derivatives thereof, and the uncontradicted evidence of the defendant, Quong Duck, showed that he did not know of the existence or the concealment, or the transportation, or the sale of said opium and opium products, or of either thereof or of any opium or opium product, and said uncontradicted evidence shows that the defendant did not know of the transportation, or

the concealment, or the sale of any opium or opium derivatives whatsoever. That the evidence, without contradiction, shows that the said building where the said Quong Duck, the defendant herein was arrested, had been a short time prior thereto, conducted as a place where opium was sold and smoked by a person unknown to the defendant herein, and with whom the defendant herein had no relation or connection whatsoever, and the evidence therefore shows that all opium and derivatives thereof concealed in said place were there concealed by said other person and not by the defendant Quong Duck.

M. G. Gallaher

R. G. Retallick

Attorneys for Petitioner.

Approved as to form, as provided in rule 45.

Attorney

[Endorsed]:

No. 668 Crim. Nor Div. IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DIVISION OF THE SOUTHERN DISTRICT. United States of America, Plaintiff, vs. Quong Duck, Defendant. ASSIGNMENT OF ERRORS. Copy of the within assignment of errors received this 29th day of Dec. 1922 Herbert N. Ellis Special Asst. U. S. Atty. FILED DEC. 29 1922 Chas. N. Williams, Clerk GALLAHER, SIMPSON & HAYS ATTORNEYS AT LAW MATTEI BUILDING FRESNO, CALIFORNIA.

IN THE UNITED STATES DISTRICT COURT,
IN AND FOR THE NORTHERN DIVISION OF
THE SOUTHERN DISTRICT.

UNITED STATES OF AMERICA,)
	Plaintiff,)
vs.)
QUONG DUCK,)
	Defendant.)

PETITION FOR WRIT OF ERROR FOR
SUPERSEDEAS AND BAIL.

TO THE HONORABLE OSCAR A. TRIPPETT,
JUDGE OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DIS-
TRICT OF CALIFORNIA:

Now comes Quong Duck, the defendant in the above
entitled cause, and feeling himself aggrieved by the
verdict of the jury and the judgment of the District
Court of the United States for the Southern District
of California, entered on the 4th day of December,
1922, hereby petitions for an order allowing him, said
defendant, to prosecute a writ of error from the
United States Circuit Court of Appeals of the Ninth
Circuit, to the District Court the United States, for the
Southern District of California; but said writ of error
may be made a supersedeas, and that your petitioner
be released on bail in an amount to be fixed by the
Judge thereof, pending the final disposition of said

writ of error. Assignment of *erros* is filed with this petition.

Quong Duck

Petitioner. by his attorneys

M. G. Gallaher

R. G. Retallick

Attorneys for Petitioner.

[Endorsed]:

No 668 Crim. Nor. Div IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DIVISION OF THE SOUTHERN DISTRICT. United States of America, Plaintiff, vs. Quong Duck, Defendant. PETITION FOR WRIT OF ERROR FOR SUPERSEDEAS AND BAIL. Copy of the within petition received this 29th day of Dec. 1922 Joseph C. Burke U. S. Atty by Herbert N. Ellis Special Ass't U. S. Atty. FILED DEC 29 1922 Chas. N. Williams, Clerk GALLAHER, SIMPSON & HAYS ATTORNEYS AT LAW MATTEI BUILDING FRESNO, CALIFORNIA

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DIVISION OF THE SOUTHERN DISTRICT.

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

QUONG DUCK,

Defendant.)

) Order Allowing

) Writ of Error.

Upon motion of M. G. Gallaher, Esq., and R. G. Retallick, Esq., attorneys for the defendant, Quong

Duck, and upon filing the Petition for a Writ of Error and Assignment of Errors, it is ordered that a Writ of Error be and same hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the order and judgment heretofore entered; that pending the decision upon said Writ of Error the supersedeas prayed for by the defendant in his petition for Writ of Error herein is hereby allowed and the defendant, Quong Duck, is ordered admitted to bail upon said Writ of Error in the sum of Twenty five Thousand dollars (\$25,000). Dated Dec. 29, 1922.

Oscar A. Trippet

Approved as to form, as provided in rule 45, Joseph C. Burke U. S. Attorney by Herbert N. Ellis Special asst. Attorney.

[Endorsed]:

668 Cr. N. D. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DIVISION OF THE SOUTHERN DISTRICT. UNITED STATES OF AMERICA, Plaintiff, vs. QUONG DUCK, Defendant. Order Allowing Writ of Error. FILED DEC 29 1922 CHAS. N. WILLIAMS, Clerk By W. J. Tufts. Deputy M. G. Gallaher and R. G. Retallick, Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

UNITED STATES OF AMERICA	:
	Plaintiff
	:
	BOND FOR
	:
	COSTS
	:
-vs-	:
QUONG DUCK	:
	Defendant.
	:

KNOW ALL MEN BY THESE PRESENTS, That we, Quong Duck as principal and Fook Kee and Cuyler Wong as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty (250) Dollars, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 11th day of April, in the year of our Lord, One Thousand Nine Hundred and Twenty Three.

Whereas lately in the 4th day of December, 1922, at the November term of the District Court of the United States for the Southern District of California, Northern Division, in a cause pending in said Court, between the United States of America, plaintiff, and Quong Duck, defendant, a judgment and sentence was rendered against said Quong Duck, and whereas, said Quong Duck thereafter obtained a writ of error directed to the said United States of America and the United States Attorney for the Southern District of

California before the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America and to the United States Attorney for the Southern District of California citing and admonishing the United States of America and the said United States Attorney to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, pursuant to the terms and at the time fixed in said citation;

Now, the condition of the above obligation is such, That if the said Quong Duck shall prosecute said proceedings under said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain and be in full force and virtue.

x Quong Duck

Principal.

Fook Kee

Cuyler Wong—

[Seal]

Sureties.

Signed, sealed and acknowledged before me this 11 day of April 1922.

Samuel F. Hollins

United States Commissioner.

Fook Kee and Cuyler Wong being duly sworn, each for himself, depose and say: that he is a resident and freeholder in the Southern District of California,

Northern Division, and is worth in property situated therein, the above mentioned sum of \$250.00 over and above all his just debts and liabilities, exclusive of property exempt from execution.

x Fook Kee

Cuyler Wong—

Subscribed and sworn to before me this 11 day of April, 1923.

[Seal]

Samuel F. Hollins

United States Commissioner.

Examined and recommended for approval as provided in Rule 29.

R. G. Retallick

Attorney

I hereby approve the foregoing bond

Dated the 16 day of Apr 1923

Trippet

Judge or Clerk

[Endorsed]:

#668 Crim In the District Court of the United States, Southern District of California, Northern Division. UNITED STATES OF AMERICA Plaintiff -vs- QUONG DUCK Defendant. Bond for Costs. FILED APR 16 1923 CHAS. N. WILLIAMS, Clerk Chas. V. Rude Deputy Approved as to form R B Camarillo Asst U. S. Atty. RETALLICK & TUTTLE ATTORNEYS-AT-LAW Cory Building Fresno, California

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN DIS-
TRICT OF CALIFORNIA NORTHERN DIVIS-
ION

UNITED STATES OF AMERICA,)	No. 668 Crim .
Plaintiff,	: BOND PEND-
-vs-) ING DECIS-
	: ION UPON
QUONG DUCK,) WRIT OF
Defendant.	: ERROR

KNOW ALL MEN BY THESE PRESENTS:
That I, Quong Duck, of the County of Fresno, State
of California, as principal, and Sue Sing Lung and
Jee Fong of the County of Fresno, State of Califor-
nia, as sureties, are held and firmly bound unto the
United States of America in the full and just sum of
Twenty-Five Thousand (\$25,000.00) Dollars, to be
paid to the United States of America, to which pay-
ment well and truly made we bind ourselves, our
heirs, executors, and administrators, jointly and sepa-
rately by these presents.

Sealed with our seals and dated this 30th day of
December in the year of our Lord, One thousand nine
hundred and twenty-two.

Whereas, lately on the 4th day of December, 1922,
at the November term of the District Court of the
United States for the Southern District of California,
Northern Division, in a cause pending in said Court,
between the United States of America, Plaintiff, and
Quong Duck, Defendant, a judgment and sentence was
rendered and entered against said Quong Duck, and

whereas said Quong Duck thereafter obtained a Writ of Error directed to the United States of America and the United States Attorney for the Southern District of California before the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America and to the United States Attorney for the Southern District of California citing and admonishing the United States of America and said United States Attorney to be and appear in the United States Circuit Court of Appeals for the Ninth circuit, at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which citation has been fully served.

Whereas the said Quong Duck has been admitted to bail pending decision upon said writ of error in the sum of Twenty-Five Thousand (\$25,000.00) Dollars.

Now, therefore, the condition of said obligation is such, that if the said Quong Duck shall appear either in person or by his attorneys in the United States Circuit Court of Appeals for the Ninth circuit when said cause is reached for argument or when required by law or by rule of said court and from day to day thereafter in said court until said cause shall be finally disposed of and shall abide by and obey the judgment and orders made by the said Court of Appeals in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed by said United States Circuit Court of Appeals and if the said Quong Duck

shall appear for trial in the District Court of the United States for the Southern District of California, Northern Division, on such day or days as may be appointed for a retrial of said cause by said District Court and abide by and obey all orders made by said District Court, provided the judgment and sentence against him shall be reversed by the said Court of Appeals, then the obligation to be void; otherwise to remain in full force, virtue and effect.

Quong Duck

Principal.

Sue Sing Lung

Jee Fong

Sureties.

[Seal] Signed, sealed and acknowledged before me
this 30th day of December, 1922.

Samuel F. Hollins

United States Commissioner.

Sue Sing Lung and Jee Fong being duly sworn each for himself deposes and says that he is a resident and freeholder in the Southern District of California, Northern Division, and is worth in property situated therein, the above sum of \$25,000.00, over and above all his just debts and liabilities, exclusive of property exempt from execution.

Sue Sing Lung

Jee Fong

Sureties

[Seal] Subscribed and sworn to before me this
30th day of December

Samuel F. Hollins

United States Commissioner.

Examined and recommended for approval as provided in Rule 29.

Richard G. Retallick

Attorney

I hereby approve the foregoing bond.

Dated the 3rd day of Jan, 1923

Trippet

Judge.

Approved as to form.

Joseph C. Burke

United States Attorney

Herbert N. Ellis

Special Assistant U. S. Attorney.

UNITED STATES OF AMERICA)
) ss.
SOUTHERN DISTRICT OF CALIFORNIA)

Sue Sing Lung being duly sworn deposes and says that he owns the following property in the Southern District of California:

160 Acre *vinyard* and orchard located five miles north-west of the City of Tulare, in Tulare County, California, planted as follows:

25 acres Thompson seedless grapes 5 to 10 yrs. old
 110 acres of Muscat grapes—15 to 20 yrs old, 25
 acres peaches, apricots and nectarines 6 to 10 year old.

This Property is valued at \$110,000.00 and is free
 of encumbrances. 1922 crop valued at \$25,000.00

Sue Sing Lung

Subscribed and sworn to before me this the 30th day
 of December, 1922.

[Seal]

Samuel F. Hollins

UNITED STATES COMMISSIONER.

UNITED STATE OF AMERICA)
) ss.
 SOUTHERN DISTRICT OF CALIFORNIA)

Jee Fong, being duly sworn deposes and says that he
 owns the following property in the Southern District
 of California:

4 lots and building in Del Rey, California. No
 mortgages: Value \$10,000.00

5 lots and Building on Tulare St., Fresno, Cali-
 fornia, no mortgages: Value \$15,000.00

1-2 interest in the Quong Tai Lung Store at 1507
 Tulare St., Fresno, California. Value 10,000.00

\$35,000.00

Jee Fong

Subscribed and sworn to before me this 30th day
 of December 1922.

[Seal]

Samuel F. Hollins

United States Commissioner.

[Endorsed]:

No. 668 Crim IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE SOUTHERN
DISTRICT of CALIFORNIA NORTHERN DI-
VISION UNITED STATES OF AMERICA Plain-
tiff vs. QUONG DUCK Defendant. BOND PEND-
ING DECISION UPON WRIT OF ERROR Quong
Duck, Def. 1511 Tulare St., Fresno, Cal. Sue Sing
Lung, Surety, Fowler, Cal. Jee Fong, Surety, 1507
Tulare St., Fresno, Cal. R. G. Rettalick, Atty. Brix
Bldg., Fresno, Calif. FILED JAN 3—1923 CHAS.
N. WILLIAMS, Clerk By Murray E Wire Deputy

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA.	}	CLERK'S OFFICE
Plaintiff,		
-vs-	}	No. 668-Crim.
QUONG DUCK,		No. Div.,
Defendant,		PRÆCIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue a transcript of the record in the above
numbered case and include therein the following
papers: Writ of Error, Citation, Judgment Roll, Bill
of Exceptions, Assignments of Error, Petition for
Writ of Error, Order allowing Writ of Error,

Supersedeas Bond, Bond for costs on Appeal and this Praeipce.

Respectfully,

R. G. Retallick

B

[Endorsed]:

Original No. 668-Crim No. Div. U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA UNITED STATES OF AMERICA, Plaintiff, -vs- QUONG DUCK, Defendant, PRÆCIPE FOR TRANSCRIPT OF RECORD. Rec'd copy of the within this 10th day of April, 1923. Joseph C. Burke, Robert B Camarillo U. S. Atty. FILED APR 10 1923 CHAS. N. WILLIAMS, Clerk. Chas. V. Rude Deputy

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

United States of America, Plaintiff,	}	No. 668 Crim. N. D.
vs.		
Quong Duck, Defendant.		

I, CHAS. N. WILLIAMS, Clerk of the United States District Court of the Southern District of California, do hereby certify the foregoing volume containing 74 pages, numbered from 1 to 74 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by Plaintiff in Error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the writ of error, citation, judgment roll, bill of exceptions, assignments of error, petition for writ of error, order allowing writ of error, supersedeas bond, bond for costs on appeal and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the Plaintiff in Error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of Cali-

fornia, Southern Division, this 24th day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-three, and of our Independence the One Hundred and Forty-seven.

CHAS. N. WILLIAMS,

Clerk of the District Court of the
United States of America, in and
for the Southern District of Cali-
fornia.

By

Deputy.

No. 4015

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUONG DUCK,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

JOHN L. McNAB,

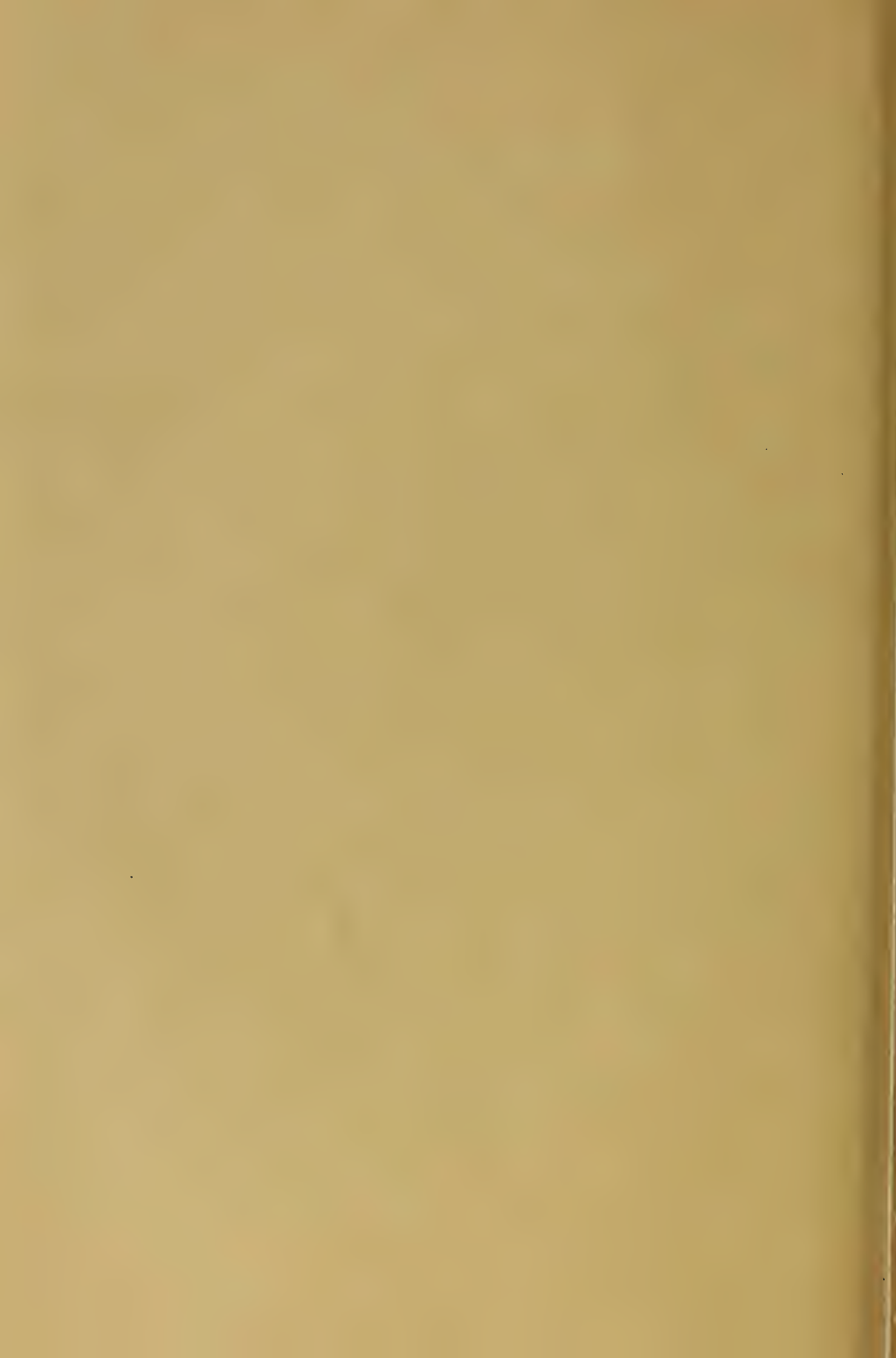
R. G. RETALLICK,

BYRON COLEMAN,

Attorneys for Plaintiff in Error.

FILED

JUL 27 1928



No. 4015

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUONG DUCK,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

The plaintiff in error was indicted in the Northern Division of the Southern District of the State of California, upon two counts for violation of the opium act.

The case came on for trial before the Honorable Oscar A. Trippet, District Judge, on November 27th, 1922. After hearing the testimony and listening to the instructions at the hour of 3:00 o'clock P. M. on Tuesday, the 28th day of November, 1922, the jury retired to the jury room for the purpose of deliberating upon a verdict. (Transcript page 14.) At 4:00 o'clock P. M., the jury returned to the courtroom and the following proceedings occurred:

The COURT. Gentlemen of the jury, have you agreed upon a verdict?

The FOREMAN. We have not, your Honor.

The COURT. How does the jury stand; I want to know just how you are divided, not as to your vote whether guilty or not.

The FOREMAN. The jury stands eight to four.

The COURT. I don't understand, gentlemen of the jury, why a verdict has not been promptly returned in this case. You may retire to your chambers; I hope you will compose your differences, there ought to be a verdict reached in this case. Anything I can do to assist you, I will do it.

Whereupon the jury retires at 4:05 P. M. for further deliberation and at 4:20 P. M. return with the verdict of not guilty on the first count and guilty as charged in the second count of the indictment. (Trans. pp. 55 and 56.)

To these proceedings the plaintiff in error duly accepted. (See assignment of errors, Nos. 6 and 7, Trans. pp. 58 and 59.)

Argument.

IT IS REVERSIBLE ERROR FOR THE COURT TO ASK THE JURY, WHEN UNABLE TO AGREE, HOW THEY STOOD NUMERICALLY WITHOUT REFERENCE TO HOW MANY STOOD FOR CONVICTION OR ACQUITTAL.

Instructing a jury to reach a verdict after they have informed the court that they cannot agree, and telling them that a verdict ought to be reached in the particular case, amounts to coercion. A verdict so rendered is not the verdict of a jury, but the verdict of the court. Where, as in the case at bar, the jury stands 8 to 4, the remarks of the court

practically amount to a demand for the four jurors to concede their differences to the majority and bring in a verdict in favor of the wishes of the majority. This practice has been severely condemned by the United States Supreme Court, and this court also has held such a practice to be reversible error. The leading case is *Burton v. United States*, 196 U. S. 283, 49 L. Ed. 482.

In that case, after deliberating for 36 hours, the jury returned to court, and was asked by the judge how they stood. The foreman replied, "11 to 1". The court thereupon urged them to return and, if possible, arrive at a verdict. In condemning this practice, the United States Supreme Court said:

"Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved.

We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the

proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.”

In *Peterson v. United States*, 213 Fed. 920 (9th Cir.), this court approved the Burton case and particularly called attention to the fact that while the error was serious in a case in which the jury stood 11 to 1, the situation was greatly aggravated in a case where they stood 7 to 5, as in the case before them.

The case at bar is more like the Peterson case because not only did the jury stand 8 to 4, showing that the facts were fairly evenly balanced in the minds of the jurors, but they brought in a verdict of acquittal on one count and of conviction on the second count. Who can tell but that the language of the court induced them upon returning to the jury room to compromise their differences of opinion by voting in this fashion. They could hardly have given much serious thought to the case after returning to the jury room, because within 15 minutes after their return, they reentered the court with their verdict. It is quite clear that the remarks of the court were greatly prejudicial. The remarks of Judge Dietrick in the Peterson case are directly applicable here.

Judge Dietrick said:

“Although after continuous deliberation for nearly a day, the case was thus almost evenly

balanced in the minds of the jurors, and, after presumably all legitimate argument had been employed, the presiding judge addressed them in such a way as to leave the inference that the five should in some way defer to the seven. True, if a jury were very unequally divided, as, for example, eleven to one, it might not be improper, in a guarded manner and with appropriate qualifications, to suggest to the one the propriety of most carefully testing the correctness of his conclusion, in the light of the opposite views entertained by his eleven associates, presumably of equal intelligence and fairness. But here, without cautioning the jurors against yielding their honest, conscientious convictions, whatever they may have been, to mere numbers or to considerations of economy, the presiding judge unqualifiedly told them that 'the case should be finally disposed of as to all' defendants. 'The government has a right', it was said, 'to a verdict without farther expenditure of time and money.' And the instruction was closed by the expression of a 'belief' that the jurors could 'honestly come to an agreement'. The court might very well have expressed the hope for such an agreement, but it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. It is to be borne in mind that nowhere did the court make it clear that, however desirable it might be to avoid another mistrial and finally terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors. It was not correct to say that the government had a right to a verdict without farther expenditure of time and money; it had only a right to a fair consideration of the case. No obligation rested upon it to make any further expenditure, for, in case of a mistrial, it would have been the right, if not the duty, of the prosecuting offi-

cers to dismiss the prosecution. In any event, it was not its right to demand an agreement; nor did the defendant have such right. But one impression could have been left upon the minds of the jurors, and that such impression was made is borne out by the event. They retired, and in less than an hour returned with a verdict acquitting the one defendant and convicting the other, and this without any new light upon the law, or any further suggestion from the court as to the significance or character of any of the evidence in the case, and after the jury had deliberated the larger part of a day, with the resultant conviction upon their part that they could not get together. Can there be any question that, retiring with the impression that the all-important thing was a final disposition of the case, the jurors consciously or unconsciously bartered the acquittal of one defendant for the conviction of the other?"

It is respectfully submitted that the judgment in the case at bar should be reversed.

Dated, San Francisco,
June 6, 1923.

JOHN L. McNAB,

R. G. RETALLICK,

BYRON COLEMAN,

Attorneys for Plaintiff in Error.

No. 4015.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Quong Duck,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

OPENING BRIEF FOR DEFENDANT IN ERROR.

JOSEPH C. BURKE,

United States Attorney,

MARK L. HERRON,

Assistant United States Attorney,

RUSSELL GRAHAM,

Special Assistant United States Attorney.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Quong Duck,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

OPENING BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was indicted in the Northern Division of the Southern District of California, upon two counts for violation of the opium act.

The case was tried on November 27th, 1922, before the Honorable Oscar A. Trippet, district judge.

In the brief of the plaintiff in error there is no argument or contention that the evidence is not sufficient to support the verdict, that the court erred in its rulings on questions of law during the course of the trial or that the court erred in its instructions to the jury.

The only ground upon which the plaintiff in error relies is that the court made certain remarks to the jury which amounted to coercion, and that the verdict of the jury was the result of this coercion.

The remarks to which the plaintiff in error objects were made when the jury returned to the court room after having deliberated for one hour. The remarks were as follows:

“The Court: Gentlemen of the jury, have you agreed upon a verdict?”

The Foreman: We have not, Your Honor.

The Court: How does the jury stand; I want to know just how you are divided, not as to your vote whether guilty or not.

The Foreman: The jury stands eight to four.

The Court: I don't understand, gentlemen of the jury, why a verdict has not been promptly returned in this case. You may retire to your chambers; I hope you will compose your differences, there ought to be a verdict reached in this case. Anything I can do to assist you, I will do it.

Whereupon the jury retires at 4:05 p. m. for further deliberation and at 4:20 p. m. returned with the verdict of not guilty on the first count and guilty as charged in the second count of the indictment.” [Tr. pp. 55 and 56.]

ARGUMENT.

The plaintiff in error relies on the case of *Burton v. U. S.*, 196 U. S. 283, 49 L. Ed. 482, and the case of *Petersen v. U. S.* 213, Fed. 920.

In the *Burton* case the court criticized the trial court for inquiring as to how the jury was divided and for the comments made by the court to the jury, but in the *Burton* case the comments of the trial court practically amounted to an insistence that the jury return some verdict. The remarks in the case at bar did not go that far. The *Burton* case, however, was not reversed because of these remarks by the court,

but was reversed on the ground that the court erred in refusing to give the jury certain instructions as requested by the defendant, and the court did not hold that these remarks were, of themselves, sufficient to warrant a new trial.

The plaintiff in error quotes two paragraphs from the decision in the Burton case. (Brief of Plaintiff, p. 3.) These paragraphs are correctly quoted, but the first paragraph quoted did not immediately precede the second paragraph quoted and did not relate to it, but related to the refusal of the trial court to charge the jury as requested by the defendant.

In the Petersen case, the language of the trial court which was criticized in the opinion, went much further than the language of the trial court in this case. Also the Petersen case was reversed on the ground that the court misdirected the jury as to the construction of the statute involved in that case and the court did not hold that the remarks complained of were, of themselves, sufficient grounds for a new trial.

The plaintiff in error has cited no case and we have found none which holds that language similar to that used by the trial court in this case is, of itself alone, sufficient ground for a new trial.

In this case the court did not express an opinion as to the guilt or innocence of the accused and there was nothing in the language used to indicate what verdict the court desired.

In the recent case of *Brolaski v. U. S.*, 279 Fed. 1, this court expressly held that the expression by the

court, after the jury had deliberated for some time, that a verdict should be returned, was not reversible error.

This question is also discussed in:

Hyde v. U. S. 225, U. S. 347, 56 L. Ed. 1114;

Campbell v. U. S., 221 Fed. 186, 136 C. C. A. 606;

Suslak v. U. S., 213 Fed. 913.

It is conceded that the court should not coerce the jury into returning a verdict, but the language used by the court in this case was not coercive.

The expression of a hope that the jury would compose their differences and the statement that a verdict should be reached is nothing more than is expressed in one way or another in nearly every charge to a jury. Every juror knows that a verdict should be reached in every case, and that the court always hopes that the jurors will compose their differences.

The transcript does not contain the court's charge to the jury and in its absence we must conclude that the court fully and correctly charged the jury as to their duties and responsibilities and as to the law of reasonable doubt, as well as to all other matters involved in the case.

It is respectfully submitted that the case at bar should be affirmed.

JOSEPH C. BURKE,

United States Attorney,

MARK L. HERRON,

Assistant United States Attorney,

RUSSELL GRAHAM,

Special Assistant United States Attorney.

No. 4023

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH FREDERICKS and CLARENCE
CHAMBERS,

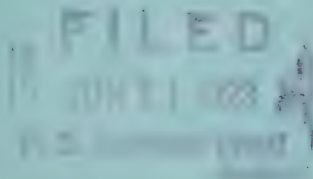
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.



United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH FREDERICKS and CLARENCE
CHAMBERS,

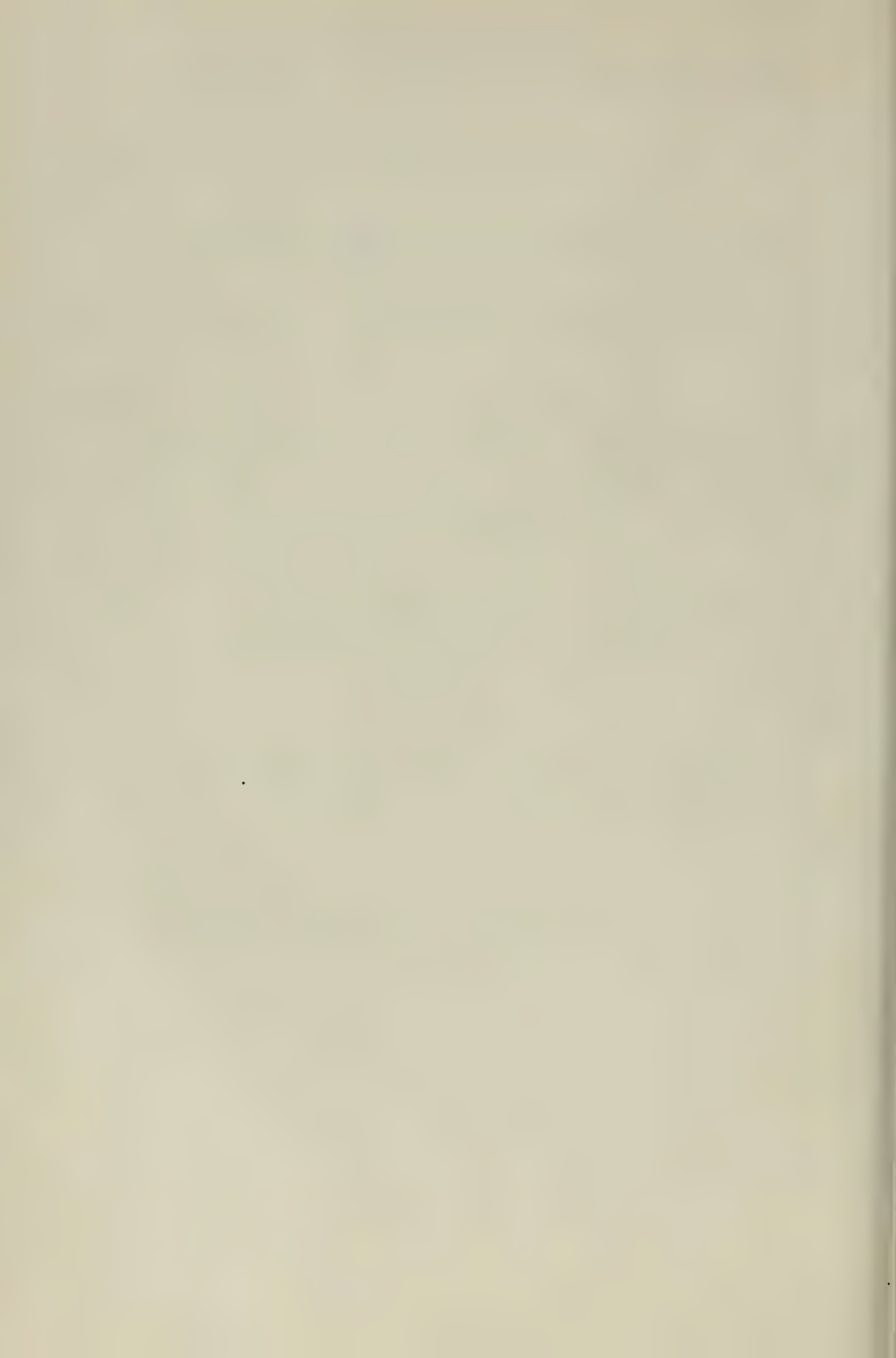
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

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Error,
310 Federal Building, Seattle, Washing-
ton. [1*]

United States District Court, Western District of
Washington, Northern Division.

May, 1922, Term.

No. 7153.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,
Defendants.

*Page-number appearing at foot of page of original certified Tran-
script of Record.

Indictment.

Vio. Sec. 37, Penal Code, and Act of Oct. 28, 1919,
National Prohibition Act.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, and each of them, on the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-two, at the town of Stanwood, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously combine, conspire, confederate and agree together, and one with the other, and together with divers other persons to the grand jurors unknown, to commit certain offenses against the United States, that is to say, to violate the provisions of the National Prohibition Act, it being then and there the plan, purpose and object of said conspiracy and the object of said persons so conspiring together as aforesaid [2] and hereinafter referred as the conspirators, to knowingly, wilfully

and unlawfully import, possess and transport intoxicating liquors, to wit, whiskey, gin and diverse other liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, such importation, possession and transportation being intended by them, the said conspirators, for the purpose of violating the National Prohibition Act by selling, bartering, exchanging, giving away, furnishing and otherwise disposing of in violation of the National Prohibition Act the said intoxicating liquors, such importation, possession and transportation of said intoxicating liquors by them, the said conspirators, as aforesaid, being unlawful and prohibited by the said Act of Congress.

That said conspiracy was and is a continuing conspiracy from, to wit, the 4th day of October, 1922, to the time of the presentment of this indictment.

OVERT ACTS.

And the grand jurors aforesaid, upon their oaths, aforesaid, do further present, that after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said conspirators, Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, and each of them, from a foreign country, to wit, British Columbia, in the Dominion of Canada, on or about the 4th day of October, 1922, did wilfully, knowingly, and unlawfully carry and transport in and on a cer-

tain gas boat known as the "Dragon," to a place near Stanwood, Washington, in said district and division, certain intoxicating liquors, to wit, two thousand six hundred and twenty-eight (2,628) bottles each containing one-fifth ($1/5$) of a gallon of a certain liquor known as whiskey, and ninety-two (92) bottles each containing [3] one-fifth ($1/5$) of a gallon of a certain liquor known as gin (the exact quantity of each of said liquors being to the grand jurors unknown), and all of said liquors then and there containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, intended then and there by the said conspirators for use in violating the National Prohibition Act, for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the National Prohibition Act, and which said importation, possession and transportation of said intoxicating liquors by the said conspirators, as aforesaid, was then and there unlawful and prohibited by the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, and each of them on the

fourth day of October, in the year of our Lord one thousand nine hundred and twenty-two, at the town of Stanwood, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully and unlawfully import and bring into the United States from a foreign country, to wit, British Columbia, in the Dominion of Canada, certain intoxicating liquor, to wit, two thousand six hundred and twenty-eight (2,628) bottles each containing one-fifth ($1/5$) of a gallon of a certain liquor known as whiskey, and ninety-two (92) bottles each containing one-fifth ($1/5$) of a gallon of a certain [4] liquor known as gin, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, and which said importing by said Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, and each of them, on the

fourth day of October, in the year of our Lord one thousand nine hundred and twenty-two, at the town of Stanwood, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to wit, two thousand six hundred and twenty-eight (2,628) bottles each containing $(1/5)$ of a gallon of a certain liquor known as whiskey, and ninety-two (92) bottles each containing one-fifth $(1/5)$ of a gallon of a certain liquor known as gin, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, intended then and there by the said Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, [5] giving away and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT IV.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, and each of them, on the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-two, at the town of Stanwood, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully and unlawfully transport in a certain vehicle then and there in charge of the said Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, to wit, a certain gas screw boat known as the "Dragon," length 49.8 feet, beam 8.2 feet, sharp head and sharp stern, Alco four-cylinder engine No. 36, net tonnage 8 tons, certain intoxicating liquor, to wit, two thousand six hundred and twenty-eight (2,628) bottles each containing one-fifth ($1/5$) of a gallon of a certain liquor known as whiskey, and ninety-two (92) bottles each containing one-fifth ($1/5$) of a gallon of a certain liquor known as gin, all of said liquors then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the grand jurors unknown, and which said transporting by the said Joseph Fredericks, *alias* Joseph Watson, and Clarence Chambers, as [6] aforesaid, was then and there unlawful and prohibited by the Act of Con-

gress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOMAS P. REVELLE,
United States Attorney.

CHARLES E. ALLEN,
Assistant United States Attorney.

A true bill.

LEWIS SCHWAGER,
Foreman Grand Jury.

[Indorsed]: Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of the Grand Jury, and Filed in the U. S. District Court, October 26, 1922. F. M. Harshberger, Clerk. [7]

United States District Court, Western District of
Washington, Northern Division.

No. 7513.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOE FREDERICKS and CLARENCE CHAMBERS,
Defendants.

Arraignment of Each Defendant.

Now on the 30th day of October, 1922, the above defendants come into open court for arraignment accompanied by their attorney D. A. McDonald. Whereupon Defendants say that their true names are Joseph Fredericks and Clarence Chambers respectively and they are allowed one week in which to plead.

Journal #10, page 348. [8]

In the District Court of the United States, for the
Western District of Washington, Northern
Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,

Defendants.

**Motion to Quash Indictment and for Return of
Property.**

Come now the defendants in the above-entitled cause having heard the said indictment read, say that the Grand Jury by which the said indictment was found and returned into open court found and returned said indictment solely upon incompetent evidence and testimony, to wit, the testimony of

Ashby W. Johnson, Oscar Hanson and William Justy, William Linville and William Griffiths, and the presentation to the Grand Jury of samples of the intoxicating liquor described in said indictment, all of which testimony and evidence was secured by the search and seizure of the gas boat "Dragon" near Stanwood, Washington, on October 4, 1922, without any legal right or authority whatsoever and in violation of the defendants' rights under the constitution of the United States and federal statutes relating to searches and seizures and of the State of Washington; and that no other testimony was heard by said Grand Jury regarding the alleged guilt of said defendants other than the testimony of said witnesses and the evidence and testimony aforesaid was all obtained in violation of the defendants' rights as aforesaid by said illegal and unconstitutional search and seizure.

And the defendants further move that the two hundred thirty-five (235) cases of whiskey and eight (8) cases of gin [9] described in the indictment herein as twenty-six hundred twenty-eight (2,628) bottles each containing one-fifth ($1/5$) of a gallon of a certain liquor known as whiskey and ninety-two (92) bottles each containing one-fifth ($1/5$) of a gallon of a certain liquor known as gin, seized on the gas boat "Dragon," the said boat at the time being in the possession of the said Chambers, be returned to the defendants or that in the event that the Court decree that they are not entitled to the return of the same, that an order be entered preventing the plaintiff from introducing

said whiskey and gin in evidence or from introducing any facts learned by the search and seizure of said launch and the said defendants on the said 4th day of October, 1922, and from introducing any of said whiskey and gin in evidence.

This motion is based upon the following grounds:

First. That no proper warrant was ever issued for the arrest or search of said defendants and the said launch.

Second. That no sufficient affidavit was ever made for the issuance of any search-warrant.

Third. No search-warrant was exhibited or read to the defendants or either of them at the time of the search and seizure.

Fourth. No copy of the search-warrant was served on defendants or either of them at the time of the search and seizure.

Fifth. No receipt for the property herein mentioned was given to the defendants or either of them at the time it was taken from them.

Sixth. No proper inventory under oath of the said property taken was made and returned to the United States Commissioner as required by law.

Seventh. No inventory of the property taken was or has been given to the defendants or either of them. [10]

Eighth. That no general warrant of arrest was in the hands of said prohibition agents at the time of the unlawful search and seizure.

Ninth. That the said search and seizure was conducted in the night-time, in that it was after sundown.

Tenth. That no offense was being committed by the defendants in the presence of the Federal officers at the time of said arrest nor was there any visible evidence of the commission of the defendants or either of them of unlawfully having in his or their possession or of unlawfully transporting intoxicating liquor.

These motions are based upon the files and records in this cause and the files and records in the same entitled cause numbered 1789 of the United States Commissioner, as filed in the office of the Clerk of this Court, and upon the affidavits of the defendants and the testimony taken at the preliminary hearing before His Honor R. W. McClelland, Commissioner, Cause No. 1787.

CARKEEK, McDONALD, HARRIS & CORYELL,
Attorneys for Defendants.

Received a copy of the within motion this 1 day of Nov., 1922.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,

Defendants.

Demurrer.

Come now the defendants Joseph Fredericks and Clarence Chambers, by Carkeek, McDonald, Harris & Coryell, their attorneys, and say:

That the said indictments and the matters and things therein set forth are, as therein alleged and set forth, not sufficient in law to compel them, the said defendants, to answer thereto, and that the said indictment joins four counts improperly and is duplicitous in that the first count is for conspiracy to violate the Act of October 28, 1919, the second count is for smuggling, both of which are felonies, and the third count is for possession of intoxicating liquors under the Act of October 28, 1919, and the fourth count is for transportation of intoxicating liquors under the Act of October 28, 1919, both of which last counts are misdemeanors. The several counts are not for the same act or transaction nor are they connected together nor are they of the same class of crimes or offenses.

(See U. S. vs. Jones, 69 Fed. 973.

U. S. vs. Scott, 4 Bus. 29.

U. S. vs. Gaston, 28 Fed. 840.

U. S. vs. Cadwallader, 59 Fed. 627.

U. S. vs. Kelsey, 42 Fed. 882). [12]

And further demurring to each count, defendants say that the first count is not sufficient in law to charge a crime in that it does not charge that the said defendants possessed the said liquor for the purpose of selling, bartering, exchanging or giving away, or if not by themselves by what person or persons the said acts were to be done; and the said count is defective for uncertainty in that regard; and that the said Count No. 1 is further defective for uncertainty in that it does not allege positively what any of the so-called liquor was but merely alleges that it was "known" as whiskey and gin.

And further demurring to Count II of said indictment, the said defendants say that Count II is defective for uncertainty in that it does not sufficiently describe what the so-called liquor was but merely charges that it was "known" as whiskey and gin.

And for demurrer to Count III of the indictment, defendants say that the matters alleged and set forth are not sufficient at law to compel them to answer thereto in that said count of said indictment does not charge that the said defendants possessed the liquor for the purpose of selling, bartering, exchanging or giving away or if not by themselves by what person or persons the said acts were to be done, and that said

count is defective for uncertainty in that count and that the said Count III is further defective for uncertainty in that it does not allege positively what any of the so-called liquor was but merely alleges that it was "known" as whiskey and gin.

And for demurrer to Count IV of said indictment, further say that the matters and things alleged and set forth are not sufficient in law to compel them to answer thereto in that said count of said indictment is defective and insufficient in [13] that it does not allege positively what any of the so-called liquor was but merely that it was "known" as whiskey and gin.

WHEREFORE, defendants pray judgment and that they may be discharged of said indictment.

JOSEPH FREDERICKS.

CLARENCE CHAMBERS.

By CARKEEK, McDONALD, HARRIS &
CORYELL,

Attorneys for Defendants.

Service accepted this 8th day of Jan. 1923.

DeWOLFE EMORY,

Asst. U. S. Atty.

[Indorsed] Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE CHAM-
BERS,

Defendants.

Plea of Each Defendant.

Now on this 8th day of January, 1923, the above defendants come into open court to plead accompanied by their attorney D. A. McDonald. Each defendant here and now enters his plea of not guilty and they are allowed the privilege to file a demurrer.

Journal No. 10, page 459. [15]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE CHAM-
BERS,

Defendants.

Trial.

Come now on this 20th day of February, 1923, the said defendants into open court for trial accompanied by their attorneys D. A. McDonald and John F. Dore. De Wolfe Emory is present in behalf of the Government. Whereupon all parties being present a jury is empanelled and sworn as follows: John N. Parker, Herman L. Shape, Charles Stellar, William H. Seifert, John J. High, Harry H. Sisler, G. J. McCormick, Bert B. Griswold, John S. Riely, Harry M. Sampson, William H. Patterson and Harry A. Ross. Opening statement is made to the jury for the Government by De Wolfe Emory. Upon motion of attorney for defendant, it is ordered that all witnesses be excluded from the courtroom except when testifying. Government witness S. C. Linville is sworn and examined. This cause is now continued to February 21, 1923, at 10 A. M.

Journal #11, page 17. [16]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE CHAM-
BERS,

Defendants.

Trial Resumed.

Now on this 21st day of February, 1923, the above-entitled cause comes on for trial with both defendants present accompanied by their attorneys. Whereupon all parties being present trial in this cause is resumed. Government witnesses are sworn and examined as follows: S. C. Linville (recalled), Walter M. Justi, W. J. Griffith, Oscar W. Hanson, E. O. Mattrand, A. W. Johnson, Leonard Regan and C. W. Kline. Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 are introduced as evidence. Government rests. Defendants now move for a directed verdict of not guilty on count II as to defendant Fredericks and that the Government be required to elect upon which of the other counts of the indictment, it will proceed. Both motions are denied, with exceptions allowed. Statement is made to the jury for the defendants by D. A. McDonald. Defendants' witnesses are sworn and examined as follows: Joseph Fredericks, Clarence Chambers, Jesse Hall, Albert Court, Frank Jackson, Oscar Tjersland, Harry Rock, Henry Whalen and S. Chambers. Defendants' exhibit lettered "A" is introduced as evidence. Defendants rest. John F. Dore, attorney for defendants moves for a directed verdict of not guilty as to both defendants on all counts. Motion is denied with exception allowed. Said cause is now argued to the jury by both sides and jury after being instructed by the court, retires for deliberation. Upon stipulation of attorneys for both sides

and defendants, it is ordered that if verdict is not reached by six o'clock P. M. the jury may bring in a sealed verdict at 10 A. M. on February 23, 1923.

Journal #11, page 18. [17]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE CHAM-
BERS,

Defendants.

Verdict Returned.

Now on this 23d day of February, 1923, both defendants being present in open court and attorneys for both sides being present and all jurors and all answering to their names, the jury returns a verdict of guilty as to both defendants on counts I, III and IV of the indictment. Verdict reads as follows:

"We, the jury in the above-entitled cause, find the defendant Joseph Fredericks is guilty as charged in Count I of the indictment herein; and further find the defendant Clarence Chambers is guilty as charged in Count I of the indictment herein; and further find the defendant Joseph Fredericks not guilty as charged in Count II of the indictment herein; and further find the defendant Clarence Chambers not guilty, as charged in

Count II of the indictment herein; and further find the defendant Joseph Fredericks is guilty as charged in Count III of the indictment herein; and further find the defendant Clarence Chambers is guilty, as charged in Count III of the indictment herein; and further find the defendant Joseph Fredericks is guilty as charged in Count IV of the indictment herein; and further find the defendant Clarence Chambers is guilty as charged in Count IV of the indictment herein.

JOHN N. PARKER,
Foreman." [18]

In the District Court of the United States for the
Western District of Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE CHAMBERS,
Defendants.

Defendants.

Verdict.

We, the jury in the above-entitled cause, find the defendant Joseph Fredericks is guilty, as charged in Count I of the indictment herein; and further find the defendant Clarence Chambers is guilty, as charged in Count I of the indictment herein, and further find the defendant Joseph Fredericks not guilty, as charged in Count II of the indict-

ment herein; and further find the defendant Clarence Chambers not guilty, as charged in Count II of the indictment herein; and further find the defendant Joseph Fredericks is guilty, as charged in Count III of the indictment herein; and further find the defendant Clarence Chambers is guilty, as charged in Count III of the indictment herein; and further find the defendant Joseph Fredericks is guilty, as charged in Count IV of the indictment herein; and further find the defendant Clarence Chambers is guilty, as charged in Count IV of the indictment herein.

JOHN N. PARKER,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 23, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH FREDERICKS *alias* JOSEPH WATSON,
and CLARENCE CHAMBERS,
Defendants.

Motion for New Trial.

Come now the defendants Joseph Fredericks and Clarence Chambers, and each of them, and move the Court to set aside the verdict of the jury herein returned on the 23d day of February, 1923, and grant a new trial for the reason and upon the following grounds:

I.

That said verdict was against and contrary to law.

II.

That said verdict was against and contrary to the evidence.

III.

Insufficiency of the evidence to justify the verdict.

IV.

There was no evidence whatever to support a verdict on the first count.

V.

Errors of law occurring during the trial and excepted to at the time by the said defendants.
[20]

VI.

Erroneous instructions given to the jury by the Trial Judge.

VII.

Refusal of the Trial Judge to give instructions requested by the defendants.

VIII.

Variance between the indictment and the proof introduced at the trial.

IX.

Misjoinder of separate and independent offenses.

X.

Misconduct of the jury.

XI.

Separation of the jury after submission of the case to them and before verdict.

XII.

The defendants further say that in the trial of this case, the Court erred in overruling defendants' motion to require the Government to elect whether the defendants should be tried upon Count I or Counts II, III and IV.

XIII.

That matters occurred in said trial prejudicial to the defendants before the jury and prevented them having a fair and impartial trial by the jury in this:—that the Court unduly restricted the right of the defendants to examine the jurors on their *voir dire* as to their qualifications to sit as jurors. That the Trial Court refused defendants the right to ask each juror if accepted on the jury, he would only vote for such verdict as he thought right under the law and evidence and would not be influenced by what the other [21] jurors thought except as they might convince him that his view was incorrect by legitimate argument, to which refusal defendants excepted. The Court erred in permitting the Government to introduce evidence as to firearms on the boat of defendants at the time of their arrest, over objection of defendants, which fact tended to prejudice the defendants before

the jury and cause it to render a verdict as the result of passion and prejudice.

XIV.

The Court erred in overruling defendants' motion to suppress the evidence when renewed at the opening of the Government's case.

XV.

The Court erred in admitting in evidence over the objection of the defendants, the liquor seized at the time of the defendants' arrest, upon the ground that the same was seized in violation of the constitutional rights of the defendants.

XVI.

The Court erred in refusing to permit the defendants to cross-examine the Government's witnesses as to the manner of their arrest and the seizure of the liquor and also to permit the defendants to go into the question of the illegality of said arrest and seizure, which refusal was duly excepted to by defendants at the trial.

XVII.

The Court erred in overruling defendants' motion for a directed verdict as to count I as to each of the defendants at the close of the Government's case, upon the ground that the Government had failed to prove the only overt act alleged in said Count I. [22]

XVIII.

The Court erred in overruling defendants' motion for a directed verdict on Count I as to each of the defendants at the conclusion of the entire case, upon the ground that there was no competent proof

before the jury as to the commission of the only overt act alleged in said Count I.

XIX.

The Court erred in refusing to instruct the jury to return a verdict of not guilty on the first count of said indictment as requested by defendants in writing at the conclusion of all the evidence.

XX.

That the Court should grant each of the defendants a new trial for error in giving the following instruction:

“In order to establish a conspiracy there must be three things established. One is the conspiring together, the co-operating, the confederating, the conduct of the parties that so interrelate into each other as to preclude a conclusion other than that there was a conspiracy and understanding to do the particular thing that is charged. And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the National Prohibition Act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down the stream, or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the Government establish all

of the overt acts charged. It is sufficient that they have proved one act that would carry forward the conspiracy," and that the offense would be complete without bringing in a drop of liquor.

To the giving of which instruction, objection was made and by the Court overruled and to which exception was at the time made in the presence of the jury.

XXI.

The Court should grant each of the defendants a new trial for the refusal of the Court to give the following instruction asked by the defendants and refused by the Court:

"Before you can find that the conspiracy charged in the indictment actually existed, you must find from the evidence [23] that one or more persons were acting in concert or combination with the defendants towards effecting or causing the result of the end claimed in the indictment, that is to violate the provisions of the National Prohibition Act by wilfully and unlawfully importing intoxicating liquors. If the evidence does not satisfactorily prove to you that some person or persons acted in concert with the defendants, that is, were knowingly assisting said defendants or participating with them in the conspiracy charged or in carrying out the same, then you cannot find that a conspiracy existed.

"You will thus see that the existence or participation in the alleged unlawful acts must

be intentional. It follows, therefore, that proof of mere suspicion or bare knowledge that the act is being done by others without such intentional participation in or connection with it, is not sufficient while knowledge of the commission of the unlawful acts may be properly taken into consideration by the jury in connection with any facts or circumstances which may be proven to aid in determining whether or not any other person was connected with the defendants as a participator in or a party to the alleged unlawful acts, if any such acts are proven, yet such mere knowledge by any person, that is knowledge that the defendants or either of them were attempting to violate the National Prohibition Act (if you find the evidence shows he or they were attempting to violate said act) would not make such other person a party to the acts. The proof must go further. Knowledge of the attempt must combine with an intent to violate said National Prohibition Act.

“If either of the defendants knew that the other defendant or any third person, charged thereby by the Grand Jurors as being to them unknown, was doing any act with intent to violate the National Prohibition Act, and having such knowledge aided such defendant in doing such act, if any such were being committed (the intent claimed by the Government herein was to violate the National Prohibition Act by importing liquor) and the other assisting

intended to aid such defendant in carrying out such intent, then I say to you that such defendant or such other person, as the proof may show, being those participating while having such knowledge, becomes and is in law a party to such conspiracy. Of course, if you are not satisfied beyond reasonable doubt that a conspiracy did exist as charged in said indictment, then without further consideration you will return a verdict of not guilty as to the defendants on this count. If you should, however, be satisfied as to the existence of such conspiracy, you must then consider whether or not the overt act charged in said First Count of said indictment has been proved beyond reasonable doubt. Such overt act must be proved as laid in this indictment, that is, that on or about the 4th day of October, 1922, the said defendants Joseph Fredericks and Clarence Chambers, and each of them, from a foreign country, to wit, British Columbia, in the Dominion of Canada, did wilfully, knowingly and unlawfully carry and transport in and on said gas boat known as the 'Dragon' to a place near Stanwood, Washington, the intoxicating liquors described in said indictment for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the National Prohibition Act. And unless such overt act is proven as it is charged in the indictment and as I have stated it to you, the crime charged cannot be

found by you to have been proven and you must return a verdict of not guilty as to each of the defendants on said Count I.” [24]

And to the refusal to the giving of which instruction, defendants at the time objected and saved their exception in the presence of the jury.

XXII.

The Court should grant each of the defendants a new trial for the refusal of the Court to give the following instruction asked by the defendants and refused by the Court:

“I instruct you that if you should find from the evidence in this case that the defendants received this liquor on board the gas boat ‘Dragon’ near Deception Pass, in the State of Washington, knowing it to be liquor, they would be guilty of a violation of law, yet you could not convict either one of these defendants upon either the first or second counts in this indictment, because to convict the defendants on the said counts, you must find beyond a reasonable doubt that they brought the liquor into the United States from British Columbia.”

And to the refusal to the giving of which instruction, defendants at the time objected and saved their exception in the presence of the jury.

XXIII.

The Court should grant each of the defendants a new trial for each and every one of the objections made to each and every instruction wherein defendants made objection thereto and which were

by the Court overruled, and to which exceptions were at the time made in the presence of the jury.

XXIV.

The Court should grant a new trial for the refusal of the Court to give each and every instruction asked by defendants which was refused by the Court, and for the modification of each instruction asked when instructions asked were modified by the Court, and to the refusal to the giving of each of said instructions or to the modification of each instruction defendants at the time objected and saved their exceptions in the presence of the jury.

JOSEPH FREDERICKS,

CLARENCE CHAMBERS,

Defendants.

CARKEEK, McDONALD, HARRIS &
CORYELL,

JOHN F. DORE,

Their Attorneys. [25]

Received copy of the foregoing and service thereof admitted this 2 day of March, 1923.

THOS. P. REVELLE,

U. S. Atty.

F. M. S.,

Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,

Defendants.

Motion in Arrest of Judgment.

Come now Joseph Fredericks and Clarence Chambers, defendants in the above style and numbered cause, and against whom a verdict of guilty was rendered in said cause on the 23d day of February, 1923, upon Counts I, III and IV of the indictment herein and each separately moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against them and each of them for the following reasons:

I.

Because Count I in the bill of indictment in this cause is insufficient to support any judgment against them or either of them in this: the indictment in said Count I seeks to charge them with an unlawful conspiracy to violate a law of the United States. Such indictment is insufficient to charge a conspiracy to violate a law of the United States in that the purpose or object of the conspiracy is not set out with sufficient or proper clearness or

certainty. The indictment charges that the object of the conspiracy was to import, possess and transport intoxicating liquors and does not further describe, declare or set out the object or purpose of the conspiracy. In the said First Count of the indictment, the liquor is not described, the ownership thereof is not alleged, the manner and [27] means of accomplishing the said conspiracy are not set out; no facts are alleged from which it can be determined by an inspection of the indictment, the exact nature and extent of said conspiracy or the means by which it was to be made effectual.

II.

Because it does not appear from the allegations in Count I of said indictment with sufficient clearness or certainty or from the allegation of facts in said indictment that the object or purpose of the alleged conspiracy was to commit an offense against the laws of the United States and that some overt act was committed by one of the alleged conspirators in furtherance of or for the purpose of carrying out the alleged conspiracy.

III.

Because on the trial of this cause, the evidence showed that the discovery of the commission of the crime, if any, committed by the defendants was secured by unlawful search and seizure in violation of the Fourth and Fifth Amendments of the Constitution of the United States, by reason whereof this Court had no jurisdiction to hear and determine the said cause.

IV.

That the evidence introduced was insufficient to sustain the verdict rendered herein.

V.

Variance between the only overt act alleged in Count I and the proof introduced at the time of trial.

VI.

Misjoinder of separate and independent offenses.

VII.

Misconduct of the jury. [28]

VIII.

That the offense of possession charged in Count III of said indictment is comprehended and included in the charge of transportation contained in Count IV of said indictment, and that the Court can only inflict one penalty on the two counts.

IX.

Separation of the jury after submission of the case to them and before verdict.

The defendants, therefore, pray that as to each of them this motion be sustained and that the judgment of conviction against them and each of them be arrested and held for naught, and that they and each of them have all such other relief as may be just or proper in the premises and that they and each of them are ever free.

CARKEEK, McDONALD, HARRIS &
CORYELL,

JOHN F. DORE,

Attorneys for Defendants Joseph Fredericks and
Clarence Chambers.

Received copy of foregoing and service thereof
admitted this 2d day of March, 1923.

THOS. P. REVELLE,
U. S. Atty.
F. M. S.,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Mar. 2, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [29]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE CHAM-
BERS,

Defendants.

Sentence of Joseph Fredericks.

Comes now on this 19th day of March, 1923, the
said defendant Joseph Fredericks into open court
for sentence, and being informed by the Court of
the charges herein against him and of his convic-
tion of record herein, he is asked whether he has
any legal cause to show why sentence should not be
passed and judgment had against him, and he noth-
ing says save as he before hath said. Wherefore,

by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating Section 37 Penal Code and Act of October 28, 1919, National Prohibition Act, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the period of 18 months on Count I of the indictment at hard labor and to pay a fine of \$50.00 on Count III and a fine of \$50.00 on Count IV of the indictment. And the said defendant Joseph Fredericks is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, vol III. [30]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE
CHAMBERS,

Defendants.

Sentence of Clarence Chambers.

Comes now on this 19th day of March, 1923, the

said defendant Clarence Chambers into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating Section 37 Penal Code and act of October 28, 1919, National Prohibition Act, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the period of 18 months on Count I of the indictment at hard labor, and to pay a fine of \$50.00 on Count III and a fine of \$50.00 on Count IV of the indictment. And the said defendant Joseph Fredericks is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, vol. III. [31]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,

Defendants.

Petition for Writ of Error.

AND NOW COME THE ABOVE-NAMED DEFENDANTS, Joseph Fredericks and Clarence Chambers, and by their attorneys respectfully show that on the 23d day of February, 1923, a jury duly impanelled herein found your petitioners guilty on Counts I, III and IV of the indictment herein; that thereafter and on the 2d day of March, A. D. 1923, and, within the time limited by law, under rules and order of this court, the defendants moved for a new trial, which said motion was by the Court overruled, and exception thereto allowed, and likewise, within said time, filed their motion for arrest of judgment, and which was by the Court overruled, and to which an exception was allowed; and thereafter on the 19th day of March, 1923, sentence of the above-entitled court in said cause was passed and final judgment was entered against your petitioners.

Your petitioners herein feeling themselves aggrieved by said verdict and judgment entered thereon as aforesaid and by the orders and rulings of said court, and proceedings in said cause now herewith petition this Court for an order allowing them, and each of them, to prosecute a writ of error from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United [32] States, and in accordance with the procedure of said Court made and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignment of errors presented herewith and herein, may be reviewed and the manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose, a writ of error and citation thereon should issue as by law and ruling of the Court provided.

WHEREFORE, premises considered, your petitioners pray that a writ of error be issued to the end that said proceedings of the District Court of the United States for the Western District of Washington, Northern Division, may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said appellate court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final

determination, that said defendants be admitted to bail, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

CARKEEK, McDONALD, HARRIS &
CORYELL,

JOHN F. DORE,
Attorneys for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [33]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,
Defendants.

**Order Allowing Writ of Error and Fixing Amount
of Bonds.**

This 19th day of March, 1923, came the defendants, Joseph Fredericks and Clarence Chambers, and by their attorneys, Carkeek, McDonald, Harris & Coryell and John F. Dore, filed herein and pre-

sented to the Court their petition, praying for the allowance of a writ of error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises; and that an order be made fixing the amount of the supersedeas bond to be furnished by each of the defendants to admit them to bail during the pending of said writ of error and until the final determination thereof by the said Circuit Court of Appeals.

NOW, on consideration of said petition and being fully advised in the premises, the Court does hereby allow the writ of error.

And it is hereby further ordered that pending the final determination of said writ of error by the said Circuit Court of Appeals, defendants be admitted to bail, and that the amounts of the supersedeas bonds to be filed by said defendants be as follows: [34]

Joseph Fredericks: \$2,500.00

Clarence Chambers: \$2,500.00

And it is further ORDERED that upon any of said defendants filing a good and sufficient bond in the aforesaid sum, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court this 19th day of March, 1923.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

United States District Court, Western District
of Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,

Defendants.

Assignment of Errors.

Come now the above-named defendants, Joseph Fredericks and Clarence Chambers, and in connection with their petition for writ of error in this cause submitted and filed herewith, assign the following errors which the defendants aver and say occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which they rely to reverse, set aside and correct the said judgment and sentence entered herein, and say that there is manifest

error appearing upon the face of the record, and in the proceedings in this:

I.

The District Court erred in overruling the motion of defendants to quash the indictment and for the return and suppression of the evidence of the liquor seized at the time of the defendants' arrest, which motion was made prior to the trial and from the showing made thereon it clearly appeared that the search and seizure was made without the proper issuance or execution of any search warrant or pursuant to any lawful arrest of the defendants and was in violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States. Due and timely exception was taken to the action of the Trial Court in overruling defendants' motion to quash and for the return and [36] suppression of the evidence.

II.

The District Court erred in overruling the demurrer to the indictment on the ground that the four counts are improperly joined therein and it is duplicitous and the several counts are not for the same act or transaction nor are they connected together nor are they of the same class of crimes or offenses.

III.

The District Court erred in overruling the demurrer to Count I of the indictment, in this that it does not charge that the defendants were to possess the said liquor for the purpose of sale, barter

or exchange, or if they were not to do it by what persons the said acts were to be done and was, therefore, defective for uncertainty.

IV.

The District Court erred in overruling defendants' motion for an inspection of the liquor and the right to take samples for analysis prior to the trial.

V.

The District Court erred in overruling defendants' motion for a bill of particulars requiring the Government to set out a description of the labels and other letters on said liquor.

VI.

The District Court erred in overruling the motion of the defendants to require the Government to elect between Count I and Counts II, III and IV as to which the defendants should be tried upon, which motion was made immediately after the case was called for trial and before the introduction of any evidence, upon the ground that Count I charged the defendants together with others as having committed the crime charged in said Count I, [37] whereas the defendants alone are charged with having committed offenses in Counts II, III and IV. Due and timely exception was taken to the action of the Trial Court in overruling the defendants' motion to elect.

VII.

The District Court erred in refusing the defendants' counsel the right to ask the jurors if each of them would vote for only such verdict as to him

should seem right irrespective of what the other jurors might think except as the other jurors might influence him by legitimate argument. A juror, Lee J. Priest, being in the box, he was asked by Mr. McDonald this question:

Q. If you were accepted on the jury, Mr. Priest, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jurymen did—

The COURT.—The question is not fair. Need not answer.

Q. —except as they might influence you by legitimate argument? The fact that seven or eight or even more of the other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?

The COURT.—That is not a fair question. What we want to find out is whether the jury knows anything about this case, whether they are prejudiced, whether they have any preconceived notions about it; not what they would do under or upon a certain state of facts.

Mr. McDONALD.—I understand that on the *voir dire* counsel has a right to ask questions—

The COURT.—No. Proceed. We will not permit any questions upon what jurors will do in the future upon any state of facts being established.
[38]

Mr. McDONALD.—Exception.

VIII.

The District Court erred in overruling defendants' motion for a return and suppression of the

liquors seized at the time of defendants' arrest, when it was renewed at the opening of the Government's case and to which due and timely exception was taken.

IX.

The District Court erred in admitting in evidence over the objection and exception of the defendants, the bottles of liquor as Government's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason that said liquor was seized in violation of defendants' constitutional rights.

X.

The District Court erred in permitting witness William Griffith to testify that he found two high-power rifles and two mauser pistols with convertible stocks on the launch of the defendants at the time of their arrest and in overruling defendants' objection thereto.

XI.

The District Court erred in overruling and in not granting the motions of the defendants for a direct verdict finding them not guilty on Count I, made at the close of the evidence introduced by the Government in support of the indictment, which motion was based upon the following several grounds:

(a) Insufficiency of the evidence to establish the overt act charged in said Count I.

(b) Insufficiency of the evidence to establish any conspiracy.

(c) Insufficiency of the evidence to establish the

overt act charged as against the defendant Fredericks. [39]

XII.

The District Court erred in overruling the motions of the defendants for a directed verdict of acquittal on Count I made at the close of the entire case and before it was submitted to the jury, which motion was based upon the following grounds:

(a) Insufficiency of the evidence to establish the overt act charged in said Count I.

(b) Insufficiency of the evidence to establish any conspiracy.

(c) Insufficiency of the evidence to establish the overt act charged as against the defendant Fredericks.

XIII.

The District Court erred in refusing defendants' counsel the right to again go into the facts on the trial as to the manner of the arrest of the defendants and the search and seizure of their launch, which refusal was duly excepted to.

XIV.

The District Court erred in overruling and in denying the motion of the defendants that the Government be ruled to elect whether it would proceed on Count III or Count IV, as one covers possession and the other transportation and the one is comprised and comprehended in the other.

XV.

The District Court erred in refusing to give to the jury the following instruction asked for by the defendants:

“If you should, however, be satisfied as to the existence of such conspiracy, you must then consider whether or not the overt act charged in said First Count of said indictment has been proved beyond reasonable doubt. Such overt act must be proved as laid in this indictment, that is, that on or about the 4th day of October, 1922, the said defendants Joseph Fredericks and Clarence Chambers, and each of them, from a foreign country, to wit, British Columbia, in the Dominion of Canada, did wilfully, knowingly and unlawfully carry and transport in and on said gas boat known as the ‘Dragon’ to a place near Stanwood, Washington, the intoxicating liquors described in [40] said indictment for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the National Prohibition Act. And unless such overt act is proven as it is charged in the indictment and as I have stated it to you, the crime charged cannot be found by you to have been proven and you must return a verdict of not guilty as to each of the defendants on said Count I.”

To the refusal to give which instruction, the defendants excepted in due time.

XVI.

The District Court erred in refusing to give to the jury the following instruction asked for by the defendants:

“I instruct you that if you should find from the evidence in this case that the defendants received this liquor on board the gas boat ‘Dragon’ near Deception Pass, in the State of Washington, knowing it to be liquor, they would be guilty of a violation of the law, yet you could not convict either one of these defendants upon either the first or second counts in this indictment, because to convict the defendants on the said counts, you must find beyond a reasonable doubt that they brought the liquor into the United States from British Columbia.”

To the refusal to give which instructions, the defendants objected and saved their exception in the presence of the jury.

XVII.

The District Court erred in refusing to give the jury the following instruction asked for by the defendants:

“Even though the evidence should convince you that each of the defendants acted illegally and maliciously, still unless you are further convinced beyond all reasonable doubt that such acts were done pursuant to a mutual agreement and understanding, you must return a verdict of not guilty as to each of the defendants on Count I.”

To the refusal to give which instruction, the defendants objected and saved their exception in the presence of the jury.

XVIII.

The District Court erred in giving to the jury that portion of the charge of the Court given to the jury, which is as follows: [41]

“In order to establish a conspiracy there must be three things established. One is the conspiring together, the co-operating, the confederating, the conduct of the parties that so interrelate into each other as to preclude a conclusion other than that there was a conspiracy and understanding to do the particular thing that is charged. And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the National Prohibition Act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down the stream, or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the Government establish all of the overt acts charged. It is sufficient that they have proved one act that would carry forward the conspiracy.”

To which instruction the defendants excepted in due time, upon the ground that it permitted the jury to find the defendants guilty of the conspiracy charged without finding the only overt act, to wit, the importation charged in the indictment to be

proved as laid but told the jury they could find the defendants guilty in spite of the fact that the overt act charged was not proved, provided they found the defendants had committed other overt acts not charged in said indictment.

XIX.

The District Court erred in giving to the jury that part of the charge of the Court given to the jury, which is as follows:

“The Court withdrew,—as I stated a moment ago briefly,—Count 2. There is a difference between Count 2, importation, and the conspiracy count. Now, a conspiracy may be completed and effected without bringing in a drop of liquor as charged. Without bringing in any liquor, if the parties entered into a conspiracy to violate the National Prohibition Act, to import liquor from British Columbia, and one of the persons then does anything to effect that object—this is simply for the purpose of illustration—if he writes a letter to carry it forward, or if he runs a boat around the bay, if he does anything,—it is immaterial what it is,—to effect the object of the conspiracy, when then the offense is complete without bringing in any of the liquor. But to import any liquor into the United States, that means to bring it in. They must actually bring the liquor in before they would violate the importation act. But under the conspiracy act, that is not necessary. I merely go a little into that detail because of the argument that

was made before you by counsel for the defendants." [42]

To which instruction the defendants excepted in due time, upon the ground that it permitted the jury to find the defendants guilty of the conspiracy charged without finding the only overt act, to wit, the importation charged in the indictment to be proved as laid but told the jury they could find the defendants guilty in spite of the fact that the overt act charged was not proved, provided they found the defendants had committed other overt acts not charged in said indictment.

XX.

The District Court erred in giving to the jury that part of the charge of the Court given to the jury, which is as follows:

"A conspiracy is sometimes denominated by law writers as a partnership in crime. Now, in a civil partnership, one partner binds the other by his acts and his statements with relation to matters within the partnership business. So in a criminal conspiracy, every person entering into a conspiracy is a partner in this conspiracy, and whatever he does or whatever he says during the continuance of the conspiracy binds the other partner; but after the conspiracy is ended or consummated, then the partnership ceases and a party then cannot bind the other party by any statements that he may make or anything that he may do."

To which instruction the defendants excepted in due time, because it fails to state that before a per-

son enters into a conspiracy or does an act that contributed to effectuate the object of the conspirators can be guilty, he must have knowledge of the existence of the conspiracy, and that the act that helps in the accomplishment of its object is done knowingly and with the intention of bringing about the accomplishment of the conspiracy.

XXI.

Thereafter, and within the time limited by law, and the order and rules of the Court, the said defendants and each of them moved for a new trial, which said motion was overruled by the Court, and an exception allowed the defendants, which [43] ruling of the Court, the defendants now assign as error.

XXII.

Thereafter, and within the time limited by law, the defendants moved the Court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the Court and exception was allowed to the defendants, and now the defendants assign as error the overruling of the said motion.

XXIII.

The District Court thereafter entered judgment and sentence against said defendants and each of them upon the verdict of guilty rendered upon the said indictment, to which ruling and judgment and sentence the defendants and each of them excepted and now the defendants assign as error that the Court so entered judgment and sentence upon the verdict, because said defendants were convicted

on proof taken from the violation of their constitutional rights and further because said Count I did not state a crime and there was in addition no evidence to support the only overt act alleged therein and judgment upon said Count I as entered was without validity in law. And the Trial Court further erred in imposing sentence upon Counts III and IV for the reason that the two offenses charged in said Counts include and comprehend each other, and the judgment as entered imposed two penalties for one offense, i. e., sentence should have been imposed, if at all, upon one or the other of Counts I or II but not upon both.

And as to each and every of said assignments of error as aforesaid, the defendants say that at the time of the making of the order or ruling of the Court complained of, the defendants duly asked and were allowed an exception to the ruling and order of the Court. [44]

WHEREFORE, defendants and each of them pray that the judgment of said Court be reversed and this cause remanded to the said District Court with directions to dismiss the same and discharge said defendants from custody and exonerate the sureties on his bail bond or in any event to grant defendants a new trial.

CARKEEK, McDONALD, HARRIS &
CORYELL,

JOHN F. DORE,
Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Mar. 19, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [45]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,

Defendants.

Appeal and Bail Bond of Joseph Fredericks.

KNOW ALL MEN BY THESE PRESENTS:
That we, Joseph Fredericks, as principal, and the
National Surety Company of New York, a cor-
poration organized and existing under and by vir-
tue of the laws of the State of New York, and au-
thorized to transact the business of surety in the
State of Washington, as surety, are held and
firmly bound unto the United States of America,
plaintiff in the above-entitled action, in the penal
sum of Twenty-five Hundred Dollars (\$2500.00),
lawful money of the United States, for the payment
of which well and truly to be made, we bind our-
selves, our and each of our heirs, executors, ad-
ministrators, successors and assigns, jointly and
severally, firmly by these presents.

The condition of this obligation is such that

WHEREAS the above-named defendant, Joseph Fredericks, was on the 19th day of March, 1923, sentenced in the above-entitled case No. 7153 to serve a term of eighteen months in the Federal Penitentiary at McNeil's Island, in the State of Washington, and in addition thereto to pay a fine of One Hundred Dollars (\$100.00); and

WHEREAS, the said defendant has sued out a writ of [46] error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

WHEREAS, the above-entitled Court has fixed the defendant's bond to stay execution of the judgment in said case in the sum of Twenty-five Hundred Dollars (\$2500.00),

NOW, THEREFORE, if the said defendant, Joseph Fredericks, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal and shall not leave the jurisdiction of this court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and

obey any and all orders issued herein by said District Court and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 19th day of March, 1923.

[Seal]

JOSEPH FREDERICKS.
NATIONAL SURETY COMPANY OF
NEW YORK.

By ROBT. W. WHYTE,
Resident Vice-President.

J. GRANT,
Resident Assistant Secretary. [47]

The foregoing bond is hereby approved this 19th day of March, 1923, and the marshal of this court is hereby ordered to release the defendant Joseph Fredericks from custody pending the determination of his writ of error and the fulfillment of the condition of the foregoing bond.

JEREMIAH NETERER,
Judge.

Approved this 19th day of March, 1923.

JEREMIAH NETERER,
United States District Judge.
DE WOLFE EMORY,
Assistant United States Attorney.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Mar. 19, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [48]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON and CLARENCE CHAMBERS,

Defendants.

Appeal and Bail Bond of Clarence Chambers.

KNOW ALL MEN BY THESE PRESENTS:
That we, Clarence Chambers, as principal, and
the National Surety Company of New York,
a corporation organized and existing under
and by virtue of the laws of the State of New
York, and authorized to transact the business of
surety in the State of Washington, as surety, are
held and firmly bound unto the United States of
America, plaintiff in the above-entitled action, in
the penal sum of Twenty-five Hundred Dollars
(\$2,500.00), lawful money of the United States,
for the payment of which well and truly to be
made, we bind ourselves, our and each of our heirs,
executors, administrators, successors and assigns,
jointly and severally, firmly by these presents.

The condition of this obligation is such that

WHEREAS the above-named defendant, Clarence Chambers, was on the 19th day of March, 1923, sentenced in the above-entitled case No. 7153 to serve a term of eighteen months in the Federal Penitentiary at McNeil Island in the State of Washington, and in addition thereto to pay a fine of One Hundred Dollars (\$100.00); and

WHEREAS, the said defendant has sued out a writ of [49] error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit, and

WHEREAS, the above-entitled court has fixed the defendant's bond to stay execution of the judgment in said case in the sum of Twenty-five Hundred Dollars (\$2,500.00),

NOW, THEREFORE, if the said defendant, Clarence Chambers, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal and shall not leave the jurisdiction of this court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District

Court and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 19th day of March, 1923.

[Seal] CLARENCE CHAMBERS,
NATIONAL SURETY COMPANY OF
NEW YORK.

By ROBT. W. WHYTE,
Resident Vice-President.
J. GRANT,

Resident Assistant Secretary. [50]

The foregoing bond is hereby approved this 19th day of March, 1923, and the marshal of this Court is hereby ordered to release the defendant Clarence Chambers from custody pending the determination of his writ of error and the fulfillment of the condition of the foregoing bond.

JEREMIAH NETERER,
Judge.

Approved this 19th day of March, 1923.

JEREMIAH NETERER,
United States District Judge.
DE WOLFE EMORY,
Assistant United States Attorney,

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [51]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON and CLARENCE CHAMBERS,
Defendants.

Bill of Exceptions on Behalf of Defendants.

BE IT REMEMBERED that at the November Term, 1922, came the said United States of America into the said Court and impleaded the said defendants in a certain bill of indictment, and that thereafter the defendants filed a motion herein to quash the indictment and for the return or suppression in evidence of the alleged spirituous liquor seized at the time of the arrest of the defendants upon the ground that the same was seized in violation of the constitutional rights of the defendants; and that thereafter on the 4th day of December, 1922, the said motion came on for hearing before the Court, at which time the said defendants and plaintiff read and offered in evidence certain affidavits, which are in words and figures as follows, to wit:

(Caption omitted.)

Joseph Fredericks and Clarence Chambers, being each first duly sworn, on oath each speaking for himself and not one for the other, deposes and says:

That the defendants now are and were at all times hereinafter mentioned, and for several years previously have been, citizens of the United States and residents of the State of Washington in this judicial district. [52]

That on the 4th day of October, 1922, at about 6:15 in the evening, defendants were on board of that certain gas boat named "Dragon" in the south channel of the Stillaguamish River near Stanwood, Washington, and were approaching the said town, and among other things there were two hundred thirty-five (235) cases of whiskey and eight (8) cases of gin on said launch, that the said whiskey and gin was enclosed in ordinary gunny sacks; and that the said launch was enclosed with a cabin; and that the said sacks containing the said whiskey and gin were inside of said cabin and entirely hidden from the view of persons outside of the said launch so that there was no visible evidence of the commission on the part of any persons on said launch of unlawfully having in their possession or of unlawfully transporting intoxicating liquors or any other crime; that when defendants had arrived at a point about one thousand (1,000) feet from the dock at the town of Stanwood and while they were still as they were informed and believed, and allege the fact to be, outside the corporate limits of the town of Stanwood, four (4) men, whom defendants afterwards learned were William A. Linville, William Justi and William Griffith, Federal Prohibition agents, and a citizen by the name of Oscar Hanson, suddenly rose up from beside a dike

on the river bank about twenty (20) feet from defendants and leveled rifles and sawed-off shotguns at defendants, at the same time crying out, "We know who you are. Stop or we'll kill you," that defendant Clarence Chambers, who was in charge of said launch, immediately brought the same to a standstill and immediately, not knowing the men on the bank to be officers and believing them to be hold-up men, stepped back into the cabin, whereupon the four men on the bank emptied their guns into the boat, one of the bullets striking said defendant Clarence Chambers on [53] the leg and seriously wounding him; and that defendant Joseph Fredericks thereupon called out to the men on the bank to desist shooting and he would bring the boat in, which he did; that defendants made no attempt at resistance, but complied with the command of the said Linville, whereupon the said four men came aboard the said boat and began a search thereof without any warrant or authority whatsoever.

That at the time the said Federal Prohibition agents and the said Hanson acting with them did not exhibit or claim to defendants or either of them that they had any warrant to search the said launch and without any legal right or authority whatsoever and without having any warrant of arrest, seized defendants and the launch, of which the said defendant Clarence Chambers was in charge, together with the following described personal property, which was in the possession of the said Clarence Chambers:

One compass in a wooden box, one compass in a brass metal box, 6 charts of Puget Sound, 8 life-preservers, tools of all kinds, one storage battery, one 22 high-powered rifle, one 38-55 Winchester rifle, 2 Mauser pistols, 4 army blankets, 2 quilts, one lap robe, 4 mattresses, 1 electrical coil, *o* razor, 1 shaving brush, 1 hair-brush, 1 comb, 1 bottle toilet water, 1 spot-light, 4 pair shoes, 1 pair boots, 1 oil-burner stove, 1 phonograph, 1 frying-pan, 1 coffee-pot, various other table-knives, forks and cooking utensils, 1 speedometer, 1 anchor, 150 feet inch rope, 3 launch lights, 1 large mirror, 1 paving assessment receipt, gas and oil receipts, 1 fire-extinguisher, 235 cases whiskey, 8 cases of gin, 4 wire bed-springs, 2 pair field-glasses;

Contrary to the desires and wishes and without defendant's consent, unlawfully kept defendants in custody without the privilege of giving bail or communication with anyone; and unlawfully and contrary to these defendants' desires and wishes and without their consent seized and took in their possession the said launch and other personal property without any authority at law whatsoever, and without claiming to defendants to have any search-warrant or without exhibiting, reading or [54] delivering a copy of any search-warrant or any warrant whatsoever, and having no visible evidence of defendants' unlawfully possessing or transporting any intoxicating liquors.

That the said agents were acting under the direction and command of Roy Lyle, Federal Prohibition director for the State of Washington; and that the said hereinbefore described agents took the said

launch and other personal property herein described and turned the same over to said Lyle; and defendants are informed and believe and charge the fact to be, that the said Lyle has reported the seizure of the same to Thomas P. Revelle, United States Attorney for the Western District of Washington, and is holding the same subject to the direction of the said United States Attorney; and that said agent, William Griffith, acting by and under the direction of the said Lyle, thereafter instituted a criminal prosecution of your defendants on the charge of unlawfully possessing and transporting the intoxicating liquors heretofore unlawfully seized; and defendants were required to get security for their appearance to answer said charge in case the Grand Jury found a true bill of indictment against them; and that thereafter on the 26th day of October, 1922, the defendants were indicted upon the testimony and evidence derived wholly and exclusively by the unlawful search and seizure herein set out.

That at no time, either at the time of the arrest or thereafter, have the said prohibition agents stated to your petitioners that they were acting under the authority of any search-warrant until at a hearing before His Honor Robert W. McClelland, United States Commissioner, on October 10, 1922, when the said William A. Linville testified that before he shot he called to the defendants that he had a search-warrant, and testified further that the same was at all times in his pocket and was not exhibited [55] or attempted to be served until after the search and arrest of the defendants, and

after one of the defendants had been taken to the hospital, and in the absence of the other he laid the same on the compass-box in said launch, as more fully appears from a transcript of said testimony which is filed herewith.

That no copy of said warrant was ever exhibited to defendants, or either of them, and that until the said hearing before the United States Commissioner on October 10, 1922, defendants never heard it claimed that the said prohibition agents, or anyone, claimed to have any search-warrant.

That the records and files of the United States Commissioner show that on the 27th day of September, 1922, an affidavit for a search-warrant was issued, of which the following is a true and correct copy:

United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT.

L. Regan, being first duly sworn, on his oath deposes and says: That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress has been and is being committed in this, that, in the City of Stanwood, County of Snohomish, State of Washington, and within the said District and Division above named, one John Doe Foster, on one gas screw-boat named "Dragon" on the 27th day

of September, 1922, and thereafter was, has been and is possessing, transporting intoxicating liquor, all for beverage purposes, on premises described as —, and on the premises, used, operated and occupied in connection therewith, all being in the County of Snohomish, State of Washington, and in said District, and all of said premises being occupied or under the control of John Doe Foster, all in violation of the Statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, this said affiant hereby asks that a search-warrant be issued directed to the United States Marshal for the said district and his deputies, and to any National Prohibition Officer or Agent or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said gas screw-boat named "Dragon," and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor and [56] *and* means of committing the crime aforesaid, all as provided by law and said Act.

(Signed) L. REGAN.

Subscribed and sworn to before me this 27 day of September, 1922.

[Seal] (Signed) R. W. McCLELLAND,
United States Commissioner, ——— District of
Washington.

That the said launch and the said two hundred thirty-five (235) cases of whiskey and eight (8)

cases of gin, together with all the other personal property, are being unlawfully and wrongfully held by the said Federal Prohibition Director and District Attorney in violation of defendants' rights under the constitution and laws of the United States.

That while defendants are informed and believe, and charge the fact to be, that the said Roy Lyle has the manual custody of the said property including the launch, liquor and other effects that he is holding them subject to the order and disposition of the United States District Attorney for this district; and that the said United States District Attorney used as evidence before the Grand Jury part of the liquor taken; and further proposes to use said intoxicating liquor, launch and other property at the trial of the above-entitled cause.

That the seizure aforesaid violates the rights of the defendants under the constitution and laws of the United States; and the retention of possession of same by the agents, officers and representatives of the Government is unlawful for the following reasons:

1. That no proper warrant was ever issued for the arrest or search of the said defendants of the said launch.

2. No sufficient affidavit was ever made as the basis for issuance of any search-warrant.

3. No search-warrant was exhibited or read to the [57] defendants, or either of them, at the time of the search and seizure.

4. No copy of the search-warrant was served on the defendants, or either of them, at the time of the search and seizure.

5. No receipt for the property herein mentioned was given to the defendants, or either of them, at the time it was taken from them.

6. That no proper inventory under oath of the said property taken was made and returned by the United States Commissioner as required by law.

7. That no inventory of the property taken was, or has been, given to the defendants, or either of them.

8. That no valid warrant of arrest was in the hands of said prohibition agents at the time of the unlawful search and seizure.

9. That said search was made in the night time in that it was after sundown.

10. That no offense was being committed by the defendants in the presence of said officers at the time of said arrest nor was there any visible evidence of the commission by the defendants, or either of them, of unlawfully having in his or their possession or of unlawfully transporting intoxicating liquor.

That thereafter on the 13th day of October, 1922, petitioners caused a demand in writing for the return of the property unlawfully seized to be served upon the said Thomas P. Revelle, United States District Attorney for the Western District of Washington, and Roy Lyle, Prohibition Director of the State of Washington, in person a copy of which demand is attached hereto, marked Exhibit "A" and

made a part hereof as [58] though here set out in full, but that despite said demand the said Revelle and Lyle retained the said launch, liquor and effects in their possession, and failed to return the same to the defendants.

That on the 21st day of October, 1922, the defendants presented a petition in Commissioner's No. 1781 to the Honorable Jeremiah Neterer, with the request that he issue an order to show cause against the United States Attorney and Federal Prohibition Director, which matter was argued before His Honor after notice to the United States Attorney's office, on the 25th day of October, 1922, and after being taken under advisement denied, as your affiants are informed by His Honor on the ground that there was no jurisdiction to entertain such motion in said proceeding, there being no case pending in court against the defendants at that time, and the court being unable to control the action of Government officers prior to an action pending in the court.

That the said property is being unlawfully and improperly held by the said District Attorney and Prohibition Director and by reason thereof and the facts herein set forth the defendants' rights under the constitution and laws of the United States have been and will be violated unless the Court orders a return of said launch, intoxicating liquors and other personal effects herein described.

(Signed) JOSEPH FREDERICKS.

(Signed) CLARENCE CHAMBERS.

(Subscribed and sworn to, etc.)

Attached as Exhibit "A," written demand for return of articles as set forth in foregoing affidavit. [59]

WILLIAM A. LINVILLE (certified copy of testimony given before the United States Commissioner McClelland on the 10th day of October, 1922, preliminary hearing), the witness produced on behalf of plaintiff, being duly sworn, testified as follows:

On the 4th of October, Agents Griffiths, Justi and myself had been stationed at Stanwood looking for the boat "Dragon." We sighted her in south bay about one o'clock in the afternoon. About 3:30 she moved in past the mouth of the south channel and tied up to some dolphins. We were lying behind a dike where the channel comes close to the shore and about six o'clock the boat came up the south channel toward Stanwood. We lay behind the dike until she was directly opposite us and we could see sacks of liquor in the boat through the windows. We stood up on the dike, everyone showing his badge. I announced we were Federal officers, to stop the boat as we had a search-warrant for it. The man at the wheel hesitated and I fired a shot across the bow. The boat was not brought in and the order to the man at the wheel to stand where he was, was not obeyed, instead he jumped through the pilot-house, at which time the shotgun was fired through the boat. Everybody lay behind the dike. Mr. Chambers then came out and brought the boat in and we took Mr. Chambers to

the hospital. The boat had two hundred nineteen (219) sacks containing twelve (12) bottles of liquor, and sixteen sacks containing six bottles of gin each, besides there was a 35-35 rifle, 22 high-power rifle and 2 Mausers with convertible stocks. Liquor was Canadian liquor.

Cross-examination.

I am a prohibition agent. This occurred near Stanwood. I had been waiting up there personally for about three [60] days. Agents Stetson and Regan had been with us but were not at the time.

We first saw the boat about noon. We climbed up on a barn on the property of a Mr. Hanson, and watched it from there through field-glasses. About four o'clock the boat came into the mouth of the river at the place where the shooting occurred, which was about one thousand (1,000) feet from the Stanwood Dock.

The launch was about forty-nine (49) feet eight (8) inches in length, eight (8) foot beam, and about four (4) feet deep. As the boat was coming up the channel, I could see sacks piled up inside the cabin.

Q. The boat had a cabin on it, had it?

A. Yes, a cabin practically the whole length of it, with the exception of a few feet at the bow.

Q. Any curtains on the windows?

A. Yes, at some of them there were curtains.

Q. And at some there were no curtains?

A. At some of them the curtains were pulled aside a little.

Q. All you saw was sacks?

A. Well, from experience with the liquor traffic, why it was very easy to distinguish that it was a sack of liquor, and not potatoes.

Q. That is not exactly answering my question. I say, what you saw was sacks. A. Yes.

Q. And those were ordinary gunny-sacks, were they? A. Yes.

The other agents and a young man by the name of Oscar Hanson and I lay behind the dike for about three-quarters of an hour before the boat got opposite us. There were some farmers [61] working in a field near there. When we first hailed the boat it was about thirty (30) or thirty-five (35) feet away from us and directly in front of us. At that point it was necessary for a boat to come very close in to the shore. I think the boat was traveling about seven (7) or eight (8) miles an hour. There is quite a current in the river there. I was in charge of the party. I got up on the dike and said, "We are Federal officers. Stop this boat. We have a search-warrant. Stand where you are." The other officers also took part in the hailing. I had a rifle and the other agents had sawed-off shotguns and buckshot. I also had a revolver. The orders not being obeyed, I fired a shot over the bow of the boat. Mr. Chambers, who was piloting the boat, called out, "Well, I am stopping it." Then Chambers jumped to get back in Agent Justi fired through the door, shooting Chambers. The engine was then in neutral and the boat was about standing still, moving very slowly. The boat at that time was about twenty (20) or twenty-

five (25) feet away from us. Fredericks then called out not to shoot and I told him to bring the boat in quick. I saw no weapons in the hands of the defendants. Fredericks swung the boat into the bank and I climbed on to it, told the men to watch Fredericks and went back through the boat and found Chambers holding his injured leg. I took hold of him and lifted him off the boat and then we decided it would be quicker to take him right up on the boat. I was the first to get on the boat, the others came after me. Fredericks ran the boat up to the dock, which took from five to ten minutes. I took Chambers to the hospital and left Fredericks in charge of the other agents.

Q. Now, you say that you had a search-warrant?

A. Yes, sir. [62]

Q. Who had it? A. I had it.

Q. What did you do with it?

A. Left it in the pilot-house of the boat.

Q. Whereabouts?

A. Right in the compass-box.

Q. Did you have anything more to do with the search-warrant, further than you have detailed?

A. Well, no. I didn't get the search-warrant myself.

Q. Well, I didn't ask you that. I asked you if you made any other statements about it, or did anybody else in connection with it, other than what you have detailed.

A. No, I just—after boarding the boat and finding it was loaded with liquor, I didn't pay any at-

tention to the search-warrant then, until we tied up. I left the search-warrant in the boat.

Q. Where is it now?

A. As far as I know, it is still on there.

Q. That is the last place you saw it? A. Yes.

Q. Where did you say?

A. In the compass-box in the pilot-house.

Q. When you laid it there, where was Mr. Fredericks? A. I don't know.

Q. Where was the other man, Chambers?

A. Why, he was in the hospital.

Q. Oh, then you laid it on the compass-box after the boat had been tied up?

A. Yes, that was after the boat was tied up that it was there. We saw the liquor and I thought after the man was wounded he was possibly of more importance than leaving that search-warrant [63] right there at that time.

Q. So you had it in your pocket all the time prior to that. A. Yes, sir.

Q. The search-warrant was issued to whom, do you know? A. Mr. Regan, I believe.

Q. And by whom, do you know?

A. I couldn't say.

Q. Do you know whether it was issued by a justice of the peace or a commissioner?

A. It was from the U. S. Commissioner.

Q. But whether it was Everett, Stanwood, or where, you don't know?

A. I believe it was issued—

Q. You didn't look at it yourself?

A. Yes, I read it over.

Q. You read it over? A. Yes.

Q. To yourself? A. Yes.

Q. When? A. On the day I received it.

Q. What day was that?

A. I believe it was on the 3d.

Q. You don't know what day it was dated?

A. No, right now I don't.

Q. You don't know the name of the United States Commissioner on it?

A. Yes, I believe it was United States Commissioner McClelland.

Q. The Judge here? A. Yes, sir.

Q. But what date it bore you do not know? [64]

A. Well, it was dated within the—prior to October 4th—or 1st.

Q. It was dated prior to October 1st?

A. No, I say it was not dated prior to October 1st.

Q. It was October 1st or afterwards?

A. I would say so, yes.

Q. And you read it over at the time it was handed to you on the 3d—by whom was it handed to you?

A. By Agent Regan.

Q. That was at the time he left your party?

A. Well, he told me he didn't know where he would be, and I had better take that search-warrant.

Q. So that you had it in your pocket then and kept it there up until the time after the boat was docked and these men had gone, and then you laid it in the compass-box in the pilot-house?

A. No, this man Fredericks was still on board. I hadn't gone up with him yet.

Q. I thought you said you didn't know where he was at that time? A. Who?

Q. Fredericks.

A. No, I knew where Fredericks was all the time.

Q. Where was he?

A. He was on the boat there.

Q. What part of the boat?

A. Standing around there. I didn't pay much attention to just where he was standing.

Q. Was he in the pilot-house?

A. Yes—well, I wouldn't say as to that.

Q. You don't know where he was?

A. I saw him there as I came down, and he was under the [65] supervision of one of the other agents, so I thought they were able to take care of him.

Q. He was not under your supervision at that time directly? A. Well—

Q. That is to say, you detailed another man to watch him?

A. You might put it that way, yes.

Q. Which agent was that?

A. Well, it was none in particular mentioned to watch him.

Q. You cannot tell us now which one it was?

A. No.

Q. How long was this after you got to the dock that you pulled the search-warrant out of your pocket and laid it in the compass-box?

A. Why, it was right after I brought this man—or had taken this man up to the hospital and I came back.

Q. About what time was that?

A. Why, I would say around ten minutes past six or so.

Q. Did you have a copy of the search-warrant?

A. I did not.

Q. Did anybody else?

A. Yes, I think Mr. Regan had.

Q. Where was Mr. Regan at that time?

A. I couldn't say.

Q. When did Mr. Regan appear on the scene after that? A. The next day, the next morning.

Q. Did you have the copy or the original?

A. I had the original, I think.

Q. Did you notice any seal on it? A. Yes, sir.

Q. You have been accustomed to serving search-warrants before, haven't you? [66]

A. Yes.

Q. You are familiar with the procedure in serving them? A. Yes, sir.

Q. Are you the man that made the seizure in this case?

A. No, I think that would be made jointly with the three agents.

Q. Who has the custody of this property now?

A. Why, as far as I know, the liquor is in the vaults, and the boat is tied up in care of the Government.

Q. Have you got a list of the things that you seized? A. Yes, sir.

Q. Where is that list?

A. I haven't it, but I know that a list was made, because I know it was made. It was gone over and checked. I cannot say who has it. Personally I ran the boat to Seattle, and as I hadn't slept for possibly three nights I took a day off for a sleep, so I don't know.

Q. You say a list was made? A. Yes.

Q. Do you know where that list is?

A. I think possibly in the office, in the hands of the custodian there, Agent Kline.

Q. There was considerable other property besides this liquor you have testified to, was there?

A. Well, there was blankets and bed-springs.

Q. You haven't with you a detailed list?

A. I haven't personally, no. I didn't make any list of what was on board whatever.

Q. Shaving outfits and cooking utensils?

A. Yes, I noticed a stove in the back there and some dishes.

Q. Isn't it your practice for one agent to make a seizure and make a report, and have the custody of the property, [67] or what are the regulations on that?

A. Yes, ordinarily that is customary.

Q. But in this case you were not the man who did that?

A. Well, I personally haven't made out any seizure report or—

Q. But you were in charge of the party?

A. I was at that time; yes, sir.

Q. And no report has been made as far as you know? A. No, sir.

Mr. McDONALD.—That is all.

The COMMISSIONER.—I think that would establish the probability. I do not see the necessity of examining any further witnesses. Do you want to put in any evidence?

Mr. McDONALD.—No. I think I would like to ask one other question.

Q. Can you state positively whether you had the original search-warrant or the copy?

A. I wouldn't state positively which one it was. I am under the impression it was the original.

Q. And your impression is that Agent Regan had the copy? A. That is my impression of it, yes.

Q. Are you positive that you announced that you had a search-warrant when you first hailed the boat?

A. Yes, I told them I had a search-warrant.

Q. It was in your pocket at the time?

A. Yes, sir. I wasn't taking it out and waving it at that time.

Q. You did not waive it at them?

A. No, sir.

Q. At no time? A. No, sir. [68]

Q. When was it that you saw those sacks first that you mentioned?

A. Why shortly before the boat was ordered to stop.

Q. About how long?

A. Oh, as soon as she came in view of us you could readily see it.

Q. When he got within sixty feet, or such a matter? A. What is that?

Q. When they were within about sixty feet?

A. Oh, no, they were closer than that then.

Q. Just a second or so before you called out?

A. Yes.

Q. And they were the ordinary gunny-sacks?

A. Yes. Well, it is ordinary burlap.

Mr. McDONALD—That is all.

(Caption omitted.)

Comes now THOMAS P. REVELLE, United States Attorney in and for the Western District of Washington, and being first duly sworn, deposes and says:

That neither he nor any of his assistants, agents or employees now has nor at any time has had in his possession or subject to his direction or control the gas boat, appurtenances and liquor, nor any part or parcel of the same, mentioned in the affidavit of said Joseph Fredericks and Clarence Chambers filed in this cause on November 1, 1922, in support of their motion to quash the indictment and for return of property.

(Signed) THOMAS P. REVELLE.

(Subscribed and sworn to, etc.) [69]

(Caption omitted.)

WALTER M. JUSTI, being first duly sworn, on oath deposes and says: That at all times herein mentioned he was, and now is a Federal Prohibition Agent for the State of Washington.

That he has read the affidavits of Joseph Fredricks and Clarence Chambers in support of the motion to suppress the evidence and for the return of property, and denies each and every allegation thereof, excepting only as may appear or be stated in this affidavit, and particularly does this affiant deny that the said sacks containing the said gin and whiskey loaded on the gas boat "Dragon" were not plainly visible to this affiant prior to any command given to the defendants, or either of them, to stop the boat or that they were under arrest.

That on October 4th, 1922, a few minutes prior to 5:45 in the evening and before dusk and at a time when objects were plainly discernible and visible for a distance of more than a quarter of a mile, the defendants proceeded up the south channel of the Stillaguamish river toward Stanwood, Washington, in charge of and on that certain gas boat named "Dragon." That this affiant, in company with Agent Linville, had first seen the said gas boat in the afternoon of said date at the hour of about 3 P. M. and had watched the movements of said gas boat from about 3 P. M. until the time of its capture; that the said gas boat was moored in one of the inlets off what is known as South Bay, being the expansion of the mouth of the south channel of the Stillaguamish river some three or four miles from the point at which the said boat was captured. That this affiant observed the said gas boat leave its first anchorage at about 4 P. M., at which time this affiant in company with Federal Prohibition Agents S. C. Lin-

ville, W. J. Griffiths and a citizen named Oscar Hanson, drove around to [70] the east and south of the town of Stanwood and took up a position along the south channel of the said river behind the dike at the point where the said boat was captured, and after taking up this position affiant observed the said gas boat "Dragon" tied up at some piling about a half a mile down the river from the place of observation.

That about the hour of 5:30 P. M. on said October 4, 1922, this affiant observed the said gas boat leave her mooring at the said piling and proceed up the said channel toward the point where this affiant, in company with said other agents and the said Hanson were stationed; that as the said gas boat was proceeding up the said channel slowly against the current towards the town of Stanwood, and when it was at a distance of 75 feet or more from this affiant, he saw clearly and plainly piled in the cabin of said boat a large number of gunny-sacks and saw that said boat was heavily loaded with said gunny-sacks; that this affiant saw and observed that the said gunny-sacks were the same kind and dimensions and sewed and tied in the same manner, with two ears at one end, as are used to contain whiskey and intoxicating liquor; that the said sacks were piled up above the ledges of the windows in said cabin; that the outlines of the bottles were visible through the gunny-sacks; that this affiant has seen a large number of such sacks in his experience as Prohibition Agent covering about a year; that this affiant knows from experi-

ence the containers and sacks of whiskey and gin and believed that the sacks which he saw on board the gas boat "Dragon" were sacks of intoxicating liquor, and that said boat was heavily laden with said liquor; that the cabin window on the right hand side, which was the side of the gas boat next to this affiant and his companions, was left down from the top and that he observed the said sacks of liquor [71] through said windows; that he also observed the said sacks of liquor piled in the cabin through the window of the pilot-house and the partially open door between the said pilot-house and the said cabin; that this affiant observed the said liquor some appreciable time before any of the officers disclosed themselves or ordered the boat to stop, and that this affiant was looking at said boat and the said liquor while the boat traveled at least the distance of 50 feet and that this affiant called the attention of his companions to the said liquor.

That before the prow of said boat came abreast of any of the said officers and when it was about twenty feet away from the said officers, all of the said agents arose from behind the dike where they were stationed and observed the said boat and agent S. C. Linville in a very loud and commanding tone of voice stated: "Stop that boat. We are Federal Prohibition Agents. We have a search-warrant for your boat and you are under arrest. Stick her nose into the bank there."

That all of the said prohibition agents had their badges pinned on the outside of their coats and

that said badges were of bright polished metal and were plainly visible to the defendants.

That at said time the defendant Chambers was in the pilot-house at the wheel; that the said gas boat was so constructed that the engine and all of the machinery, the clutch and the gear could be operated by the man at the wheel; that as above stated, the window of the pilot-house next to the agents, or between the agents and the said Chambers, was lowered its full length, and the said Chambers was standing right next to the said open window; that the said Chambers, instead of obeying the command of the said officers, increased the speed of said boat and attempted to spurt ahead; that thereupon [72] Agent Linville fired a shot across and in front of the bow of the boat and into the water, and not at the defendants, or either of them, and each and every one of the said agents yelled in a loud tone of voice: "We are Federal Prohibition Agents. Stop that boat. You are under arrest."

That after the said shot was fired by the said agent Linville into the water and ahead of the bow of said boat, the said boat had reached a point abreast and slightly ahead of the said agents, and thereupon the said Chambers threw the clutch out of said boat so that the same did not further proceed ahead but left the engine still running, at which time said Chambers stated: "She is stopped now."

That the said Agent Linville and each of the said agents stated to the defendants in loud tones

which could plainly be heard, over and over again, not only once but more than half a dozen times that they were Federal Prohibition Agents, that they had a search-warrant for the boat; that the defendants were under arrest; that the defendants should bring the boat in at once to the bank and that not only did Agent Linville but each of said agents, including this affiant, especially commanded the said Chambers not to leave the pilot-house and not to make any move except to bring the boat into the bank where they could board her, but instead of obeying said command the said Chambers allowed the boat to drift down with the current and away from the said officers; that in spite of the express commands given over and over by these officers and after they had fully disclosed their identity and shown their badges and authority, the said defendant Chambers suddenly darted into the cabin and out of sight of said officers; that this affiant, as well as his companions had been informed and they firmly believed that the said boat was heavily armed [73] and had been informed and believed that the operators of said boat had threatened to shoot and kill any officers who should interfere with them, and they believed that the said Chambers had jumped into the said cabin for the purpose of securing firearms with which to shoot this affiant and his companions; that thereupon the officers did fire one shot into and towards the boat, one of the officers shooting into the gas-tank for the purpose of disabling it, and another into the cabin. The shots which went into the gas-tank and into the

cabin were from a sawed-off shotgun loaded with buckshot; that one of the buckshot passed through a portion of the fleshy part of the leg of Chambers just above the knee, inflicting a flesh wound which bled profusely; that as a matter of fact the officers did find the boat to be very heavily armed, and at the point and place where the defendant Chambers darted into the cabin there were found two high-powered rifles, and one Mauser automatic convertible case gun, and one similar Mauser gun in the pilot-house, each of the guns, except one high-powered rifle, being fully loaded, with shells in the chambers, ready for instant action; that at the time this affiant fired he believed himself in imminent danger of serious bodily harm and believed that the defendants intended to fire on this affiant and the said officers and to escape with said boat and its cargo of liquor.

That after the command had been first given by said Linville to bring the boat into shore and before this affiant fired toward said boat, this affiant observed the defendant Fredericks stick his head out of a window in the stern of said boat and after looking at these agents hurriedly slam the window shut.

That while all these events were taking place it [74] was broad daylight and just about 5:45 P. M. and some minutes prior to 6 P. M. That these events took place about 1,000 feet below the dock at the town of Stanwood; that fully three minutes elapsed from the time the said Chambers threw out the clutch and the time the agents shot

into the boat, during all of which time the agents were commanding the defendant to put into shore and were discussing with the defendants their identity and giving their commands.

That after the said last shots were fired the defendant Chambers broke out another window in the cabin and held up his wounded leg and yelled, "Don't shoot any more, I am bleeding to death. Take me to a hospital." Thereupon, defendant Fredericks went in the pilot-house, threw in the clutch and brought the boat to the bank. That the said Hanson was acting with and under the direction of the said agents and was assisting them. That immediately when the boat came to the shore this affiant and his companions went aboard, at which time Agent Linville had in one hand his pistol and in the other hand the search-warrant, a copy of which is hereto attached and marked Exhibit "A." That the said Linville and all of the said agents gave their first attention to Chambers, the wounded man. That immediately upon boarding the boat this affiant and his companions observed the firearms mentioned in the defendant's affidavits, lying on top of the liquor and in the pilot-house; that after a few minutes the agents with the defendants proceeded in the boat to the dock at Stanwood where they tied up and Agent Linville took defendant Chambers off the boat to a hospital, at which time it was but 6 P. M. That after Linville had left with the said Chambers this affiant in company with Agent Griffith saw the search-warrant lying on the compass-box in the cabin. [75]

This affiant especially denies that there were 235 cases of whiskey and 8 cases of gin on this boat, but alleged the fact to be that there were 219 sacks of whiskey of various brands and 32 packages containing 6 bottles each of gin.

This affiant specially denies that the command, "We know who you are; stop, or we'll kill you," was given by any of the said officers to the defendants.

This affiant admits that the said boat and its equipment, together with the cargo of liquor, was taken into custody by the said Prohibition Agents and is now in the custody of the said Prohibition Director in the said City of Seattle, and the seizure has been reported to the Federal Prohibition Commissioner at Washington, D. C.; that the equipment on said boat alleged in the affidavits of defendants is substantially correct, there only being, however, two army blankets.

This affiant admits that a complaint was filed before Commissioner R. W. McClelland charging the said defendants with violation of the National Prohibition Act, and that the said defendants were indicted later by a Federal grand jury, and admits that an application and affidavit for search-warrant were filed on or about September 27, 1922, before R. W. McClelland, United States Commissioner, and a search-warrant issued for the said gas boat "Dragon," based upon the said affidavit, and further admits that a demand was made for the return of the property seized.

(Signed) WALTER M. JUSTI.

(Subscribed and sworn to, etc.)

Attached as Exhibit "A" to foregoing affidavit is a copy of the application and affidavit for search-warrant contained in the affidavit of Joseph Fredericks and Clarence Chambers heretofore set out. [76]

(Caption omitted.)

S. C. LINVILLE, being first duly sworn, upon oath deposes and says: That at all times herein mentioned he was and now is a Federal Prohibition Agent, having been such for more than six months last past. That he has read the affidavit of Walter M. Justi herein and knows the contents thereof. That he was one of the arresting officers mentioned in said affidavit. That in particular does this affiant state that he saw the gunny-sacks of liquor piled in the cabin, through an open window on the right-hand side of the cabin, a considerable and appreciable time and while the gas boat "Dragon" was traveling at least the distance of fifty feet before this affiant or any of his fellow-officers arose from behind the dike to stop said boat or to arrest the defendants or either of them. That this affiant is familiar with liquor sacks and containers and knows from actual experience the kind of sacks and their appearance, which contain intoxicating liquor. That the sacks which this affiant observed through the cabin window of said boat before any arrest was made, were the kind of sacks used to contain liquor and this affiant firmly believed that the said sacks did contain intoxicating liquor. That before either this affiant or any of his

companions boarded the said boat this affiant saw through an open door between the pilot-house and the cabin, a large number of gunny-sacks containing intoxicating liquor and that the outlines of the bottles were plainly visible to this affiant through said sacks. That neither this affiant nor any of his companions commanded said gas boat to stop or attempted an arrest or search of said defendants or the boat, until after they had seen and observed that the said boat was loaded with intoxicating liquor and not until after they had seen that the cabin of said boat was practically filled with sacks of liquor. [77] That this affiant has read the affidavit of the defendants herein, knows the contents thereof and denies each and every allegation therein contained excepting only in so far as the same may be admitted or stated in the affidavit of Walter M. Justi herein. That the affidavit of said Walter M. Justi is substantially true and correct as this affiant verily believes, therefore adopts the statements therein contained to the same extent as if herein fully set forth.

(Signed) S. C. LINVILLE.

(Subscribed and sworn to, etc.)

(Caption omitted.)

WM. J. GRIFFITH, being first duly sworn, on oath deposes and says: That at all times herein mentioned he was and now is a Federal Prohibition Agent for the State of Washington, and has been since March 1, 1922.

That he has read the affidavit of Walter M. Justi herein, knows the contents thereof and believes the same to be true, and adopts the statements therein contained as his own to the same extent as if fully set forth herein.

That especially does this affiant state that before any command was given to the defendants, or either of them, to stop the boat or to bring the boat into shore he plainly and clearly saw through an open cabin window the said sacks of liquor with the outlines of the bottles therein, in the cabin of said gas boat "Dragon." That this affiant knows the type of sacks which contain liquor and in which liquor is imported or shipped and before this affiant acted in this instance he was firmly convinced that the said large number of sacks which he saw piled in the cabin of the said gas boat "Dragon" contained intoxicating liquor.

(Signed) WM. J. GRIFFITH.

(Subscribed and sworn to, etc.) [78]

(Caption omitted.)

OSCAR HANSON, being first duly sworn, upon oath deposes and says: That he is a resident and has been, for a number of years, of Stanwood, Washington, and at all times herein mentioned was and now is an American citizen. That he has read the affidavit of Walter M. Justi herein and notes the contents thereof. That the statements in said affidavit in so far as they bear upon matters within this affiant is alleged to be present, are substantially true and are hereby adopted by this affiant. That

this affiant as stated in said affidavit was stationed behind the dyke near Stanwood as said gas boat "Dragon" appeared. That when the gas boat was some distance away from where the agents were stationed and approaching said position this affiant saw that one of the windows of the cabin on the right-hand side was lowered the full length and through this window this affiant personally observed clearly and plainly a large number of gunny-sacks piled in the cabin which gunny-sacks this affiant believed contained liquor and are the kind that this affiant has seen liquor in heretofore. That he observed these gunny-sacks and they were also observable by the agents an appreciable time before Agent Linville or any other agent arose from behind the said dyke and commanded said boat to stop. That said officers did disclose their identity not only once but many times to the defendants and in a loud tone of voice and that the time of day was not later than 5:45 P. M. while it was still very light.

(Signed) OSCAR HANSON.

(Subscribed and sworn to, etc.) [79]

(Caption omitted.)

JOSEPH FREDERICKS, being first duly sworn, on oath deposes and says:

That he has read the affidavits of Walter M. Justi, Oscar Hanson, William J. Griffiths and S. C. Linville herein; that the said persons could not possibly have seen what was inside of the cabin; that all of the blinds were down; that all of the liquor was

concealed in gunny-sacks, none of which were piled above the windows of said cabin as claimed in the affidavit of said Justi; that there was nothing peculiar about the said sacks which were ordinary burlap and tied and sewed in no different manner from any other gunny-sacks; that the door between the pilot-house and the cabin was shut and not opened until after the agents attempted to stop the said boat, at the time when defendant Chambers came into the engine-room to try and start the engine again so as to bring the boat to the bank in compliance with the commands of the armed men, who were then threatening to kill the defendants, and whose identity was at that time unknown to the defendants.

That the statements that persons on the bank told them they were prohibition agents or had a search-warrant or were placing them under arrest was false and untrue.

That the statement that the said Chambers attempted to speed up the boat is false and untrue, as is also the statement that any agent fired a shot across the bow before firing into the boat; that all of the shots were directed into the boat and apparently for the purpose of killing affiant and his codefendant.

That affiant did not stick his head out of the window of the stern of the boat as claimed in the affidavit of the said Justi, but after the shooting began lay on the bottom of the boat expecting every minute to be killed. [80]

That practically no time elapsed between the time that the said Chambers stepped back from the

pilot-house into the cabin when the shooting began; that after the said Chambers was shot, he attempted to assist him in stopping the loss of blood; that the statement that the said Chambers broke out a window and held out his wounded leg and yelled, "Don't shoot me. I'm bleeding to death. Take me to a hospital," is absolutely false and untrue.

That the statement that Agent Linville had in one hand his pistol and in the other a search-warrant is false and untrue. That affiant called out to the men on the bank to stop shooting, that he would bring the boat in after the said Chambers was shot, and that he stepped into the pilot-house and all the men on the bank were levelling guns directed at him and commanding him to throw out a line; that he called to the men on the bank to permit him to come outside without shooting him and he would comply with the order; that he then brought the boat to the bank and the said Linville came to the boat with a gun in one hand and a revolver in the other, but had absolutely no search-warrant or any other document; that affiant remembers this particularly because he attempted to help the said Linville up on the deck of the boat, which was several feet above the edge of the river bank, but the said Linville pulled out of his hand evidently thinking he was attempting to take the rifle from him, whereas he was merely attempting to help him board the boat; in the meanwhile all of the other agents had their guns pointed at him.

That the statement that there were firearms lying on the top of the liquor in said boat is false and untrue.

That after they landed at the dock in the town of Stanwood, the said Linville took the defendant Chambers up to a hospital; that during all the time the said Chambers was away, [81] he was held in the cabin under the guard of the said William M. Justi and was not at any time in the pilot-house and never saw or heard of any search-warrant at any time until he heard the said Agent Linville testify in the United States Commissioner's Court on preliminary hearing that he had a search-warrant in his pocket and at that time the said Linville made no claim to have shown or exhibited it to anybody.

(Signed) JOSEPH FREDERICKS.

(Subscribed and sworn, etc.)

(Caption omitted.)

CLARENCE CHAMBERS, being first duly sworn, on oath deposes and says:

That he has read the affidavit of Walter M. Justi, herein; that the statement contained in said affidavit that the gunny-sacks in said launch could be seen is false and untrue, as they were piled wholly in the cabin of said launch, the windows and blinds of which were down preventing anyone from seeing what was in said launch; that furthermore the said gunny-sacks were the ordinary burlap gunny-sacks and were sewed and tied in no peculiar manner but in the same way that all gunny-sacks that are tied are sewed and tied.

That the statement that the sacks were piled above the ledges of the windows of said cabin is false and untrue; that the outlines of any bottles were visible through the said gunny-sacks was false and untrue; that the door from the pilot-house to the cabin was closed until after the said agents began shooting at affiant so that the statement that the gunny-sacks could be seen through said open door is false and untrue.

Affiant denies that the agents at any time prior to their coming aboard the boat announced that they were Federal [82] prohibition agents or that they had a search-warrant for the boat or that the defendants were under arrest; that if the agents had badges pinned on their coats, affiant could not see them and thought at the time that the men were not officers but hold-up men.

That the statement in the affidavit of said Justi that affiant "increased" the speed of said boat and attempted to speed ahead, that thereupon Agent Linville fired a shot across and in front of the bow of the boat and into the water, and not at the defendants, or either of them, and each and every one of the said officers yelled in a loud tone of voice, "We are Federal Prohibition Agents. Stop that boat. You are under arrest," is all false and untrue; that at no time did affiant attempt to increase the speed of said boat after he heard the shouts from the bank; that agent Linville did not fire a shot across the bow in front of said boat and no persons on the bank announced that they were Federal Prohibition agents or that the defendants were under arrest; that as heretofore stated, at

no time until after the agents had come aboard the said boat and begun their search thereof, did any one of them announce that they were Federal Prohibition Agents, and at no time were the defendants ever advised that they claimed to have any search-warrant for the said boat.

That the statement in said affidavit that affiant was commanded not to leave the pilot-house was false and untrue; that in attempting to stop the boat affiant killed the engine and attempted to go into the engine-room to start it again when he was fired on and seriously wounded in the leg by bullets from the guns of the agents; that affiant at no time attempted or had in mind any resistance to the attacking party.

That since filing his first affidavit herein, affiant [83] has ascertained that the shooting took place about two thousand (2,000) feet below the dock at Stanwood and outside the corporate limits thereof.

That the statement that three (3) minutes elapsed from the time affiant threw out the clutch and the time the agents shot into the boat at affiant is false and untrue; that he was shot at just a few seconds after stepping into the cabin.

That the statement in said affidavit that he broke out a window in the cabin and held up his wounded leg and yelled, "Don't shoot any more. I'll bleed to death. Take me to a hospital," is false and untrue and that on the contrary, he huddled down in the engine-room, expecting any moment to be killed.

That the statement that there were firearms lying on the top of the liquor is false and untrue.

Affiant especially denies that "Exhibit A," which is an application and affidavit for a search-warrant, was ever exhibited to him, or that any reference to any search-warrant was ever made at any time.

That he has read the affidavits of Oscar Hanson, S. C. Linville and William J. Griffiths, which are merely reaffirmations of the statement contained in the affidavit of Walter Justi, and that his denials apply as well to the statement therein contained.

(Signed) CLARENCE CHAMBERS.

(Subscribed and sworn to, etc.)

(Caption omitted.)

GEORGE R. MYRON, being first duly sworn, on oath deposes and says:

That he is now and for a period of more than twelve (12) years last past has been a resident of Snohomish County, Washington; that he is and for some time past has been engaged in [84] farming near the City of Stanwood, in said county and State.

That on the 4th day of October, 1922, between 5:30 and six o'clock in the evening, affiant was on the farm of his brother-in-law, Martin M. Leque, where he was assisting his brother-in-law and his hired man, Eric Sederstrom, in handling baled straw on the said Leque's farm, and were working near the entrance to a barn on the river bank about one hundred (100) yards from where the launch "Dragon" was shot at, when his attention was attracted by the sight of the launch "Dragon" coming slowly up the Stillaguamish River, when affiant

suddenly heard someone call out in a loud voice, "You —, bring that boat back. We know who you are." (The omitted language in the foregoing statement was of such highly profane and obscene character, affiant omits to state it.) That immediately there followed a rifle shot and affiant saw five (5) men appear on the top of the dike on the opposite side of the river with guns in their hands, which they immediately levelled at the launch and fired; at the time this volley was fired the launch was practically at a standstill and immediately thereafter was brought onto the bank and men on the bank boarded it.

That affiant could plainly see and hear everything that occurred from the time that he first saw the launch until the men behind the dike boarded the boat; that at no time did the men on the bank state that they were prohibition officers or law enforcement officers of any kind, nor did they state that they had any search-warrant, nor did they display any badges, but kept cursing and abusing the persons aboard the launch and threatening to kill them; that not less than ten (10) shots were fired by the men on the bank but that no attempt at resistance was made by the men on the launch.

That affiant has read that portion of the affidavit of [85] William M. Justi herein, in which he states that one of the agents named Linville immediately when the boat came to the shore had in one hand his pistol and in the other a search-warrant; that affiant at all times had a plain view and that while he does not know the names of the agents, he saw a large man first to approach the

boat and board it and that he held in one hand a rifle and in the other a pistol; that he had nothing else in his hands; and that affiant saw one of the men on the boat help him get aboard of the launch; that affiant was unable to see what was being carried in said launch.

Affiant further says that he saw no badges on the men who stood on the bank and shot at the board; that during the whole of the occurrence, affiant never had any intimation that the parties doing the shooting were officers of the law but from the foul and profane language used believed at the time that it was a party of drunken hunters who had fallen into a row.

That affiant is satisfied in his own mind that all curtains on the said launch were down and that it was impossible from either bank to determine what was inside of said launch; that affiant was paying particular attention to the affair because the shots were directly in line with the home of his brother-in-law, wherein the family of his brother-in-law were, and that affiant feared that the shooting might endanger the lives of said family; and that the shooting seemed to affiant to be without warning or excuse; and at the time he had intended to have the persons participating therein prosecuted.

(Signed) GEO. R. MYRON.

(Subscribed and sworn to, etc.)

(Caption omitted.)

MARTIN N. LEQUE, being first duly sworn, on his oath [86] deposes and says:

That he is an American citizen and that at all the times herein mentioned and for many years prior thereto, he is and has been engaged in farming on a farm near the City of Stanwood, Snohomish County, Washington, said farm being situated on the north bank of the Stillaguamish River in said County and State.

That he has read the affidavit of George R. Myron herein, knows the contents thereof and believes it to be true, and hereby adopts the statements therein contained as his own to the same extent as if fully set forth herein.

Affiant further states that his residence is but a short distance from the bank of said river and was directly in line of fire of the party of armed men who conducted the shooting aforesaid; that not only was his said house within range and line of fire of said men, but that the foul and vile profanity used by said men was easily heard at his said house wherein were affiant's wife and small children.

Affiant further states that to the best of his knowledge and belief all curtains were down on said launch and that it was impossible from either bank to determine the character of the freight she was carrying; that affiant had a plain view of the launch and the persons stopping the same, and that the men on the bank made no reference to a search-warrant or that they were officers nor

did any of them exhibit any paper before boarding the launch.

(Signed) MARTIN N. LEQUE.

(Subscribed and sworn to, etc.)

(Caption omitted.)

ERIC SEDERSTROM, being first duly sworn, on his oath deposes and says: [87]

That he has been a resident of the city of Stanwood for about eighteen (18) years last past, and that during all the times herein mentioned he was engaged as a farm-hand on the farm of Martin S. Leque near the city of Stanwood, Snohomish County, Washington.

That he has read the affidavits of George R. Myron and Martin N. Leque herein, knows the contents thereof and believes the same to be true; that at the time set forth in said affidavit he was driving a load of straw and was in the act of approaching the barn on said farm, to which he was hauling said straw, and that at said time he was very near to where Leque and Myron were standing on the river bank, that affiant hereby adopts the statement contained in the affidavits of George R. Myron and Martin N. Leque, respectively as his own to the same extent as if fully set forth herein.

Affiant especially states that he at no time heard any of the men on the opposite bank of the river make any mention of being officers of the law or of having any search-warrant whatsoever, nor did they exhibit any paper but that, on the contrary, it appeared to affiant as though said shooting party were bandits or the like; that the language used

by said men in a loud voice was foul and indecent; that the contents of said launch was not visible to persons on shore.

(Signed) ERIC SEDERSTROM.

(Subscribed and sworn to, etc.)

J. W. REYNOLDS, GEORGE J. KETCHUM, L. P. HANSON and C. W. BROXAW, in a joint affidavit, all depose that they were residents of Stanwood, Washington; that on the 29th day of November, 1922, in company with Federal Prohibition Agents Justi and Linville, they made an examination of the place at which the "Dragon" was seized on October 4, 1922; and measured [88] the distance where Martin N. Leque, George R. Myron and Eric Sederstrom were in and that it was seven hundred twenty (720) feet away from the place where the said launch was seized and it would be impossible for any person or persons to see distinctly any object aboard the boat, such as curtain, blind or window, open or shut, or to hear any conversation clearly at such distance, or to see and be able to state that there were no badges worn by the officers; that it would be utterly impossible for persons from the position at which Leque and the others were, to see and determine whether or not the blinds were drawn; that the residence of Leque was not in the line of fire by 340 feet; that the locations of the officers during the occurrence were not known by the affiants by their own knowledge but merely as stated by the officers.

(Caption omitted.)

WALTER M. JUSTI and S. C. LINVILLE, being each first duly sworn on oath, deposes and says, each for himself, and not one for the other, that they have read the affidavits of George R. Myron, Martin N. Leque and Erick Sederstrom, and the reply affidavits of Clarence Chambers and Joseph Fredericks; that he denies the statements contained in the affidavits of said Myron, Leque and Sederstrom, as more fully set forth in the affidavit in chief of this affiant.

That replying especially to the affidavit of said Chambers, this affiant denies that in attempting to stop the boat the said Chambers killed the engine and alleges the fact to be that at no time was the engine killed or stopped until the officers tied up the boat at the City Dock in Stanwood, Washington, between twenty and thirty minutes after the first command to halt the boat was made.

That replying particularly to the affidavit of said [89] Fredericks, this affiant denies that the said Fredericks helped or attempted to help the said Linville to get aboard the boat.

That answering especially the affidavit of said Myron, this affiant states that by actual measurement with a tape the distance from the point where the boat was first commanded to halt and was fired upon, to the point where Myron, Leque and Sederstrom were working, was 700 feet, that the distance from the point where the officers boarded the "Dragon" to the place of said Myron was 725 feet.

That the said Stillaguamish River where the

shooting occurred, has dikes on each side some 8 or 10 feet high; that the place where Myron and his associates viewed the said incident was practically on a level with the top of the dike on the westerly side of the said river, while the said agents were on the easterly bank; that the distance between the dikes at this point is about 500 feet, and the said Myron and his companions were north from a line directly across stream, a distance of 350 feet; that at a distance of 700 feet it would have been impossible for the said Myron and his companions to see or clearly determine whether the windows on either side of the boat were opened or closed, or to see any gunny-sacks of liquor; that it would have been impossible for the said Myron and his companions to hear clearly what occurred.

That this affiant denies that the boat, when shot at, was in line with the residence or place of the said Leque but that the said residence or place of the said Leque was at least 500 feet from the line of firing, as the agents were shooting at an angle of more than 90 degrees away from the residence and place of the said Leque; this affiant further denies that there were five (5) men but states the fact to be that there were only four (4) men. [90]

That this affiant further alleges that the said George R. Myron, above referred to, stated to these affiants on November 29th, 1922, at his home in Stanwood, Washington, that he originally signed an affidavit brought to him by an attorney by the name of Peters; and some 4 or 5 days later said Peters returned to him (Myron) with another affi-

davit stating that he had been compelled to change the original affidavit to conform to certain legal requirements, as he understood, whereupon the said Myron inquired if it was the same affidavit that he had originally signed and was told that it was and that the said Myron stated he signed the last affidavit without reading it, and which affidavit is the one served by the defendants on the Government in said case; that when these affiants read to the said Myron the last affidavit signed by him, the said Myron stated that it contained different statement from the original affidavit and was not true to the facts and that the affidavit signed by the said Myron on behalf of the Government was in line with the truth and the occurrences on said October 4th, 1922.

That neither Myron, Leque or Sederstrom could observe from their positions the windows on the right side of the boat which was the side upon which the agents were located, but could see only the left side of the boat "Dragon" and the agents have never claimed that the windows on the left side of said "Dragon" were open.

That referring especially to the affidavit of Reynolds, Ketcham, Hanson and Brokaw, these affiants pointed out to the said Reynolds and others, including said Emil Matterand, on November 29th, 1922, the relative positions of the Agents, the river, the gas boat "Dragon," the said Myron and his companions, as they were on October 4th, 1922, at the time of the said capture; that the said Matterand is the owner of the land where [91] the

agents were and was present and heard and saw the occurrence on October 4th, 1922, and that the measurements of the said Reynolds and others, were based upon statements made by these affiants and the said Matterand.

(Signed) S. C. LINVILLE.

(Signed) WALTER M. JUSTI.

(Subscribed and sworn to, etc.)

(Caption omitted.)

E. O. MATTERAND, being first duly sworn, on oath deposes and says:

That he has been a resident of Stanwood for the past thirty years engaged in farming. That about 4:30 P. M. October 4th, 1922, Federal Agents, Griffith, Justi and Linville appeared on my place in Ford car driven by Oscar Hanson; the agents stated to me what they were after and together we all sat and talked regarding the boat "Dragon" which I saw lying down the river a short distance. About 5:15 P. M. the agents decided to take a position on the dyke and each and everyone took his badge and pinned it on the outside of their coat so that it could be plainly seen. This was done in my presence. I walked down to the dyke with the agents to the position they took up on the dyke. I stayed there with them until one of the Agents, Griffiths, remarked, "Here she comes," meaning the boat "Dragon." At this I walked towards the house behind the dyke, walking about 150 feet. I stopped and layed behind the dyke in a clump of bushes. The boat proceeded up the river towards the

officers. About the time the boat was opposite the officers I heard them, meaning the officers, shout, "Stop the boat; we are Federal officers," also to stand in the pilot-house, "bring that boat in," "don't move," "stay where you are," and "don't move," were some of the [92] remarks made by the officers. After the order of the officers to stop the boat that they were federal officers, I heard a shot and saw the water splash in front of the bow of the boat and in the water. Orders from the officers repeatedly were to bring her in to the bank, that they were federal officers and not to move, stand where you are, were repeated over and over again, two or three minutes after the first shot was fired which I saw strike the water in front of the bow of the boat, several shots were fired in a volley, not more than half a dozen shots in all. I could hear the engine running all the time and it never stopped at any time. The exhaust was out the side and could be heard clearly. This was about 6 P. M. or a little before. It was still light and objects could be clearly seen.

I have known the boat "Dragon" for several months and have noticed her plying the river about my place and after she was moored at my landing I have noticed her many times and never have I seen any blinds over the windows although there were some thin curtains over some of the windows which were parted in the middle and ties to each side at the bottom. I never found any blinds drawn on the windows at any time I ever saw the

boat, and could look into the boat through any of the windows.

On October 5, 1922, I personally visited the boat. I could see the sacks through the windows and it was piled higher than the bottom of the windows and to my judgment within two feet from the roof of the cabin. The forms of bottles could be clearly seen through the sacks.

(Signed) E. O. MATTERAND.

(Subscribed and sworn to, etc.)

(Caption omitted.)

GEORGE R. MYRON, being first duly sworn, on oath deposes and says: [93]

That he is now and for the period of more than twelve years past has been a resident of Snohomish County.

That referring to his affidavit regarding the seizure of the boat "Dragon" on October 4th, 1922, he wishes to state that he, George R. Myron, in company with M. N. Leque did not notice the boat "Dragon" or know that anything was going on until he heard one shot, at that they looked in the direction of the shot and saw the boat and men on the dike. I did not hear any voices or see any boat or know that any boat was around until the report of one shot was heard.

A short time after the shot was heard, two or three minutes I would say, I heard a volley of shots. I could not say how many shots I positively heard.

That I could tell whether or not the curtains were up on the boat or hear clearly all the conversation between the men on the bank and the boat was impossible due to the distance I was from the scene of action.

The man who first entered the boat had something in one hand which I could not clearly see but believe to be a revolver. The man on the boat was standing back by the pilot-house and did not assist the man in boarding the boat. This man climbed on the bow of the boat unassisted by anyone.

I heard the men on the bank say, "Stand where you are. Hold. Stand where you are and bring that boat in." But I could not hear clearly all that was said due to the distance I was from the boat.

(Signed) GEO. R. MYRON.

(Subscribed and sworn, etc.)

(Caption omitted.)

L. D. ANGEVINE, being first duly sworn, on oath deposes and says: [94]

That he is an American citizen and for the past year has been a resident of the town of Stanwood, County of Snohomish, engaged in publishing a newspaper ("The Stanwood News").

That he, on the night of October 4, 1922, in company with the arresting officers, investigated the boat "Dragon," which had been seized with a load of contraband liquor.

That he entered the launch through the pilot-house. From thence he passed through a door leading into the main part of the boat, which was

also the engine-room, and climbed over a pile of half or quarter sized gunny-sacks, which appeared to be filled with bottles judging by the shape and forms which could be distinguished through the sacks.

These sacks were piled against the wall and in front of the door leading from the pilot-house to the cabin and within, to the best of my judgment, two feet from the roof. It was easy to determine the forms of bottles through the burlap, and all of the sacks which I inspected bore tags bearing the inscription "For Export."

Beyond this was situated what I would call the main passenger cabin, which was filled with sacks of the same description as were piled next to the pilot-house.

Immediately to the rear of the pilot-house, just to the right of the door leading from the pilot-house, was a bunk, on top of several cases of liquor piled on top of the bunk, I saw three guns, namely, one high-powered .22 rifle, one .35-55 Winchester and one German Mauser with a convertible stock. These in my judgment, could be easily obtained by simply leaning over the pile of liquor directly in back of the pilot-house.

The liquor in the main or passenger cabin, as I might call it, was also piled within, to the best of my judgment, two [95] feet of the roof, and past the bottom of the windows. That the bottom of the windows, as I remember, were practically on a level with the deck.

It was evident to me at this time, from the surprise of the officers upon seeing the manner in which the boat was heavily loaded and from their remarks, that they had not been in that part of the boat previously to this time to make a search, as the remark was made that "we will give her a thorough search and see if they have any narcotics on board."

At all times I distinguished a strong smell throughout the boat. This odor I distinguished when approaching the boat, at a distance of at least 20 feet.

The cabin, to the best of my judgment, was not more than four and a half feet above the level of the deck.

(Signed) L. D. ANGEVINE.

(Subscribed and sworn to, etc.)

WILLIAM ROUSE, postmaster at Stanwood, and Dr. O. F. STARR, of Stanwood, Washington, each filed affidavits substantially the same as the foregoing affidavit of L. D. Angevine.

Thereupon the said motions were argued by counsel for the said defendants and the Government and at the conclusion of said arguments the Court took the matter under advisement and thereafter on the 7th day of December, 1922, filed the following written decision:

**Opinion of Court Denying Motion to Quash and
Return.**

United States District Court, Western District of
Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS, De-
fendants. [96]

DECISION.

The COURT.—The defendants were indicted for conspiring to violate the National Prohibition Act, also for importing from Canada into the United States 2628 bottles of whiskey and 92 bottles of gin, and for transporting this liquor, after importing it, and for possessing the same liquor; the liquor having been imported and transported in a gas screw boat known as the "Dragon," length 49 feet 8 inches, and beam 8 feet 2 inches.

The defendants have filed a motion to quash and for a return of the property on the ground that the liquor was secured by a search and seizure of the gas boat without authority, and in violation of the defendants' rights; that, no proper warrant was issued, nor a sufficient affidavit filed, and no search-warrant exhibited or return made, nor copies served, and many other irregularities in the execution of the warrant and return are set forth.

The issue is submitted upon affidavits by the defendants and on the part of the Government. It appears that on the 27th day of September, 1922, a search-warrant was obtained from the Court Commissioner in Seattle upon affidavit by a Federal Prohibition Agent. After securing the search-warrant the officers went to Stanwood and from the banks of the Stillaguamish River through a field-glass watched the boat on the afternoon in question and about three o'clock in the afternoon the boat came up the river approaching the point where the officers were stationed. The officers were concealed behind a dyke some eight or nine feet above the river. As the boat was approaching they saw it was heavily laden, and the officer saw

"clearly and plainly piled in the cabin of said [97] boat a large number of gunny-sacks . . . the said gunny-sacks were of the same kind and dimension sewed and tied in the same manner, with two ears at one end, as are used to contain whiskey and intoxicating liquor; that, the said sacks were piled up above the ledges of the windows in the said cabin; that the outlines of the bottles were visible through the gunny-sacks . . . that, this affiant knows from experience the containers and sacks which he saw on board the Gas Boat 'Dragon' were sacks of intoxicating liquor." "The form of the bottles could be clearly seen through the sacks."

Another affiant states: The officers had been informed that the boat was heavily armed and that the operators had threatened to

“Shoot and kill any officer who should interfere with them. . . . The officers did find in the cabin . . . two high-powered rifles, and one Mauser automatic convertible case gun and one similar Mauser gun in the pilot-house, each of the guns, except one high-powered rifle, being fully loaded with shells in the chambers ready for instant action.”

The boat was hailed by the officers to stop. There is dispute as to what took place, the officers contending that the challenge to stop was disobeyed and that one of the defendants reached for what they believed to be a gun, and a shotgun was discharged into the gas tank to disable the boat, one shot of which struck a leg of one of the defendants. The defendants deny this and contend they stopped the engine.

THOMAS P. REVELLE and CHAS. E. ALLEN,
Attorneys for the U. S.

CARKEEK, McDONALD, HARRIS & COR-
YELL, Attorneys for Defendants.

NETERER, D. J.—From the facts presented I do not think it necessary to enter into a discussion whether or not the basis for a search-warrant was sufficient, or whether the search-warrant was executed at all, or illegally executed. The knowledge which the officers had moved them to file an affidavit with the commissioner, which was deemed sufficient.

and this knowledge was supplemented by the appearance of the cargo and the conduct of the boat on the day of seizure, the conduct of the [98] defendants, the exposure of the form of the bottles in the gunny-sacks "in plain sight," and on the proofs presented there is no question in my mind as to the liquor being in plain sight in the gunny-sacks usually employed for the transportation of liquors, and under the circumstances the officers were warranted in arresting the defendants, seizing the boat and the liquor thus exposed to view. This conclusion is clearly within the holding of the Circuit Court of Appeals of this Circuit, *Vachina vs. U. S.*, 283 Fed. 35, and in harmony with the holding of the same Court in *Lambert vs. U. S.*, 282 Fed. 413, and is in agreement with sound reason and weight of authority. The defendants' contention that curtains were drawn over the windows of the boat, thus hiding the liquor, is not sustained. The motion to suppress the liquor as evidence and to quash the indictment is denied.

(Signed) JEREMIAH NETERER,

Judge.

Whereupon, the Court having in accordance with said written decision entered an order overruling and denying defendants' motion to quash and for the return and suppression of said evidence, said defendants severally excepted to the order of the Court in denying and overruling each of said motions and the defendants' exceptions to said ruling of the Court were duly allowed.

BE IT FURTHER KNOWN that on the 8th day of February, 1923, the aforesaid defendants, having demurred to the aforesaid indictment, the same came on for argument on the 15th day of February, 1923, and at the conclusion of said arguments, the Court took the same under advisement and on the 24th day of January, 1923, filed a written decision herein as follows: [99]

United States District Court, for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WATSON, and CLARENCE CHAMBERS,

Defendants.

Decision.

THOMAS P. REVELLE, DeWITT EMORY, Attorneys for Plaintiff.

CARKEEK, McDONALD, HARRIS & CORYELL, Attorneys for Defendants.

NETERER, District Judge.—The defendants are charged in four counts, one with conspiracy to violate the provisions of the National Prohibition Act, two with importing intoxicants, three, with possession of intoxicants, four, with transporting liquor. The several offenses are alleged to have been committed on the same day, and all having relation to the same intoxicants, and the

transactions are all related. The defendants demur on the ground that several causes are improperly united, a felony and misdemeanor, and that the several counts are defective and uncertain for failure to allege the kind of intoxicating liquor, imported, etc.

The Court in *U. S. vs. Vincent*, Cause No. 6283, filed January 5, 1922, disposed of an identical issue against the contention of the defendant, citing *Glass vs. U. S.*, 222 Fed. 773. That was a case tried before the writer and affirmed by the Court of Appeals in which the Court specifically held that a misdemeanor and felony may be joined. The other objections are equally unfounded. The demurrer is overruled.

(Signed) JEREMIAH NETERER,

Judge. [100]

Whereupon the Court entered an order denying said defendants' demurrer and said defendants severally excepted to the order of the Court in overruling said demurrer and the defendants' exceptions to said ruling of the Court was duly allowed.

BE IT FURTHER KNOWN that on the 20th day of February, 1923, at the hour of 3:30 o'clock P. M., the above-entitled cause came on regularly for trial in the above-entitled court before the Honorable Jeremiah Neterer, Judge thereof; the plaintiff appeared by DeWolfe Emory, Special Assistant United States Attorney for said district, the defendants being present in person and by their counsel, Carkeek, McDonald, Harris & Coryell, and John F. Dore, whereupon a jury being called, the

following came forward and answered to their names, as follows: Lee J. Priest, Ruby E. Brooks, Charles Stellar, Louis F. Swift, John J. High, Fred C. Phillips, W. H. Ford, Bert B. Griswold, John S. Riley, Andrew J. Stoors, James H. Po-cock, Edgar Royer, whereupon Donald A. Mc-Donald, one of the attorneys for defendants, proceeded to ask the first juror, Lee J. Priest, the following questions:

Q. If you were accepted on the jury, Mr. Priest, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jurymen did—

The COURT.—The question is not fair. Need not answer.

Q. —except as they might influence you by legitimate argument? The fact that seven or eight or even more of the other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?

The COURT.—That is not a fair question. What we want to find out is whether the jury knows anything about this [101] case, whether they are prejudiced, whether they have any preconceived notions about it; not what they would do under or upon a certain state of facts.

Mr. McDONALD.—I understand that on the *voir dire* counsel has a right to ask questions—

The COURT.—No. Proceed. We will not permit any question upon what jurors will do in the future upon any state of facts being established.

Mr. McDONALD.—Exception.

Whereupon the Court directed counsel for the defendants to address his general questions as to the qualifications of the jurors to the jury *en masse* and not to repeat the same to each individual juror. To this ruling defendants excepted and the said defendants' exceptions were fully allowed.

Whereupon the empanelling of the jury was proceeded with and after the exercise of the challenges of the respective parties, the jury was regularly and duly empanelled and sworn to try the cause and the special assistant United States attorney, having made a statement to the jury, the following evidence was thereupon offered:

Testimony of S. C. Linville, for the Government.

S. C. LINVILLE, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is S. C. Linville and I am a Federal prohibition agent. I have been in that business two years. On the 4th of October, 1922, I participated in the seizure of the gas boat "Dragon." This took place at the south fork of the Stillaguamish River near Stanwood, Washington. There was about 219 cases of whiskey of six bottles each, and 16 cases of gin consisting of 6 bottles to a case. The defendants were on the [102] boat at the time.

I had occasion to watch the movement of the gas boat "Dragon" all that day. I first saw it about one o'clock, around noon, I was on the top of a silo on

(Testimony of S. C. Linville.)

Mr. Hanson's farm near Stanwood at the time. This farm is situated on the main or north fork of the river. When I saw the "Dragon" first, it was in Mud Bay, which is the mouth of the south channel. About one o'clock, I climbed up on top of this silo, which gave me a vision of practically the entire country and out in the mouth of the south channel called Mud Bay I sighted this boat. I saw her personally leave Stanwood Sunday, October 1st. Being quite a distance out there, I was unable to tell distinctly whether that was the boat or not and got a pair of glasses, about three in the afternoon, and with the aid of these glasses I was able to distinguish the boat as being the "Dragon." We watched her movements through the glasses and between three and four, possibly might have been half-past three or four, they picked up anchor from the present position in which they had been lying and moved around into the mouth of the south channel, a short distance inside to Snaggy Point. And at that time, we proceeded around by machine through East Stanwood down to a Mr. Matterand's place, who owns a farm on the east side of the south fork of the river. We arrived there about 4:30 and staid there quite a little while. We could see the boat down below tied up to some dolphins at Snaggy Point. We took a position down on the dike, where the channel of the South Fork of the Stillaguamish River comes very close into the bank. That is, it makes it necessary for a boat coming up there to come in very close to the

(Testimony of S. C. Linville.)

bank. Agents Justi, Griffith and myself and Oscar Hanson, who had piloted us around there with his car, took our positions at that point. About 5:30 as we [103] were all sitting there, the "Dragon" left her mooring and started to come up the river. When she got opposite us, we three agents rose up on the dike and called out that we were Federal agents,—to stop the boat,—that we had a search-warrant,—and for it to stand where it was. About that time the boat started to proceed ahead a little faster than it had been going. I might explain to you that the boat was a one man control. It is controlled from the pilot-house. The advance or retarding motion, to go ahead or to go neutral, may be controlled from the pilot-house. As she started to advance ahead at greater speed, I fired a shot in front of the bow in the water and again ordered them to stop that boat and bring it to the bank. Then Mr. Chambers, who was piloting the boat, said, "Well, she has stopped." The boat was still moving slightly and I told him again to bring her into the bank so we could get on to it. That order was repeated by us a number of times. Finally the boat began drifting down. All this time as she came up, we could see through the windows the sacks containing liquor, the curtains were not drawn. In the middle they parted down. In the pilot-house there was a partition separating the engine-room from the pilot-house with a door in it. The liquor was piled up there so that this door could not be closed and left an opening. We could

(Testimony of S. C. Linville.)

see the liquor piled up in through it. We could distinguish the bottoms of the bottles through the burlap sacks. We could see that prior to the time that we gave the command to stop and told them who we were. In fact, we three agents saw these bottles a minute or two minutes before we arose from the dike. .

Disregarding our orders to stand where he was at the time, Mr. Chambers darted through the door separating the engine-room from the pilot-house, leaving it open and we could see the [104] entire load at that time. At the same time that he jumped through there, Agent Justi fired a shotgun loaded with buckshot through the other door.

Q. (By Mr. EMORY.) At that time had you any reason to believe that the defendants' boat was armed?

Mr. McDONALD.—We object to that question.

The COURT.—Objection sustained.

The defendants disregarded the first shot fired across the bow. I would say that about three or four minutes elapsed between the first shot and the shot fired at Chambers. In the meantime the defendants argued with us. We were paying particular attention to defendant Chambers who was in the pilot-house. No effort was made at that time to bring the boat into the shore. After the shot was fired at Chambers we all laid down behind the dike. Rising on the dike, we again gave the order for them to come in and bring the boat to shore. Defendant Chambers then came out and said, "For Christ's sake, don't kill us." One of the men was

(Testimony of S. C. Linville.)

shot. At that time I was covering him with a revolver. I said, "We don't want to kill anyone." I don't know where Fredericks had been prior to that time. After Chambers was shot, I told Fredericks to bring the boat into the bank and he did. As I went down the bank I had a revolver in one hand and a search-warrant in the other. As the boat came on to the bank, I climbed on the bow still covering Fredericks with my revolver. I went over the bow and into the pilot-house. At the same time I covered Chambers. He was sitting in the rear of the boat on some sacks of liquor. As I got up there I saw he had no firearms with him. This took place at about 5:45 P. M. on October 4, 1922. [105]

Q. (By Mr. EMORY.) Is this one of the sacks of whiskey that was on the boat at that time?

Mr. McDONALD.—If your Honor pleases, we object to this evidence on the ground that it was seized in violation of the constitutional rights of the defendants. We desire to renew our motion heretofore made—

A. Yes, sir.

Mr. McDONALD.—Just a minute. I am addressing the Court.

The COURT.—Motion is denied. Objection is overruled. Exception noted.

Mr. McDONALD.—Exception.

Government's Exhibit No. 8 is a bottle of King George whiskey.

(Testimony of S. C. Linville.)

It is one of the bottles that came out of a sack taken from the launch "Dragon." Government's Exhibits 1, 2 and 3 are also bottles of whiskey taken from the boat "Dragon" at the time of seizure and initialed by me on October 6th, after the boat had been brought to Seattle. That is likewise true as to Government's 4, 5, 6, 7 and 10, all being bottles of whiskey taken from the boat "Dragon" and turned over by me, after being initialed, to Mr. Kline of the Federal Prohibition Department in Seattle, who took charge of them. I saw the "Dragon" on Sunday, October the 1st, proceeding down the north channel in the afternoon, leaving Stanwood. I was duck hunting at the time. I cannot say how many men were on her.

Cross-examination.

I cannot say exactly what time on Sunday I saw this boat but to my best judgment I would say about three o'clock. I came to Stanwood September 25th or 26th. I went duck hunting on Sunday the 1st about 6:30 in the morning. Agents Regan and Stetson and two of the Hanson boys were with me in the afternoon when I saw the boat. When I first saw the boat that day she was [106] coming down from Stanwood out of the north channel about one o'clock. I was about four or five hundred yards from the boat and had it under observation for about thirty minutes. I did not see it again until October the 4th about one o'clock. When I first saw it, it was lying at anchor in Mud

(Testimony of S. C. Linville.)

Bay, which is about a mile from Stanwood. I cannot say whether it was stuck on the mud flats there or not but I know it was anchored. At that time I could not see any persons on the boat. Between three and four o'clock that afternoon, through a pair of glasses, we noticed someone on the bow of the boat lifting an anchor. Between the time that I first saw the boat up until between three and four o'clock, it was in one position, then it moved in toward the south fork of the Stillaguamish River toward Stanwood. Agents Justi, Griffith, Oscar Hanson and his brother were with me. The boat tied up at Snaggy Point, which is about half a mile from Stanwood. She lay there tied up at some dolphins until a little after 4:30 when she left that mooring and came up the south fork of the river very slowly toward Stanwood. In the meantime, we were lying behind the dike. All the time from the time we saw the boat until it came up opposite to us, except for the periods I have mentioned when it was anchored or moored, it was moving toward Stanwood. The place where we lay behind the dike was about a thousand feet from Stanwood. From dike to dike the channel there is about five hundred feet wide. At low tide there is very little navigable water. At high tide this varies, but at the place where we were behind the dike the channel was very narrow—ran very close to the dike,—practically right up into the bank. The tide was running out at the rate of about five miles an hour. The river has quite a current on an

(Testimony of S. C. Linville.)

ebb tide. The boat was proceeding up the river, possibly as slowly as five or six miles an hour. I would think it was about a [107] thousand feet from where the boat was tied up at Snaggy Point to where we lay behind the dike. I was in charge of the party. When the boat got opposite me, I raised up and stated that we were Federal officers and to stop the boat and we had a search-warrant for it. Agents Justi and Griffith also rose from behind the dike. They were armed with riot shot-guns. I had a revolver in my holster. Agent Justi shot defendant Chambers. At the time the boat was drifting down, the engine was running on the boat, the clutch was out, but the boat was still moving, slightly drifting down the stream. I never fired into the boat personally. Agents Justi and Griffith each fired one shot into the boat.

Q. (By Mr. McDONALD.) The launch was riddled with bullets, wasn't it? A. No, sir.

The COURT.—What is the purpose of this, Mr. McDonald?

Mr. McDONALD.—I want him to detail the occurrence there. I want to test this man's accuracy of what took place.

The COURT.—We are trying one issue here. We are not engaged in exploiting anyone else. That has not any materiality here. I have been pretty liberal here, but I don't want to lose sight of the issue.

Mr. McDONALD.—Under the decision of the Supreme Court.

(Testimony of S. C. Linville.)

The COURT.—I have been pretty liberal in the cross-examination. I don't want to lose sight of the issue here.

Mr. McDONALD.—Under the decision of the Supreme Court in the 65th Law Edition,—your Honor is familiar with that case,—I have a right to present again the question of the unlawfulness of this search and seizure.

The COURT.—That is not the issue here. That has been disposed of.

Mr. McDONALD.—Your Honor will recall that the *Supreme* [108] *held* that irrespective of the fact that it had been raised before the trial of that case, counsel has a right to renew it and pursue that investigation.

The COURT.—No, we are not going into that again.

Mr. McDONALD.—Your Honor will allow me an exception.

The COURT.—Oh, yes.

Before the boat was stopped, I saw the sàcks and could see the contour of the bottles.

Q. I will ask you if at the hearing before Judge McClelland on or about the 10th day of last October,—you stated you were a witness there,—if you were not asked these questions and gave these answers:

“Q. The boat has a cabin on it, had it?

A. Yes, a cabin practically the whole length of it, with the exception of a few feet at the bow.

(Testimony of S. C. Linville.)

Q. Any curtains on the windows?

A. Yes, at some of them there were curtains.

Q. And at some there were no curtains?

A. At some of them the curtains were pulled aside a little.

Q. All you saw was sacks?

A. Well, from experience with the liquor traffic, why it was very easy to distinguish that it was a sack of liquor and not potatoes.

Q. That is not exactly answering my question. I say what you saw was sacks?

A. Yes.

Q. Those were ordinary gunny-sacks, were they? A. Yes."

Q. In the examination you were asked these questions:

"Q. When was it that you saw these sacks first that you mentioned? [109]

A. Why, shortly before the boat was ordered to stop.

Q. About how long?

A. Oh, as soon as she came in view we could readily see it.

Q. They were ordinary gunny-sacks?

A. Yes, well, it was ordinary burlap."

Mr. McDONALD.—You were asked those questions and gave those answers? A. Yes, sir.

Q. You never mentioned anything about seeing the forms of the bottles.

A. I said through experience as prohibition officers—

(Testimony of S. C. Linville.)

Q. I read that question. That is all that you stated at that trial? A. Yes, sir.

At the time I started down the dike, I had a search-warrant in one hand and a revolver in the other.

Q. (By Mr. McDONALD.) At the trial of this matter before Judge McClelland, I will ask you if these questions were not asked and you gave these answers: .

“Q. Now, you say that you had a search-warrant? A. Yes, sir.

Q. Who had it? A. I had it.

Q. What did you do with it?

A. Left it in the pilot-house of the boat.”

Mr. EMORY.—I object to that as not proper cross-examination.

The COURT.—Objection sustained.

Mr. McDONALD.—Now, if you Honor please, I propose to show that this witness testified at that hearing that he had the search-warrant in his overcoat pocket and never did exhibit it to these men.

[110]

The COURT.—Ask him that question.

Q. I will ask you if you did not testify at that hearing substantially this: That Agent Regan had this search-warrant and left the night before this occurrence and gave you, I don't know whether a copy or the original,—and at the time of this occurrence you had it in your overcoat pocket, and at no time did you exhibit it or take it out of your pocket until you had taken this man to the hospital

(Testimony of S. C. Linville.)

and came back and in the absence of Mr. Fredericks left it in the compass-box.

A. I believe I stated at that hearing I left that search-warrant in the compass-box after coming back from the hospital; that I had it in my pocket as I came on the bow of the boat. I replaced it in my pocket, if I remember correctly.

Q. Do you want to tell the jury that you testified to that before Commissioner McClelland.

A. Something like that. I don't believe anything was mentioned—

Q. I have a transcript of what you testified to.

A. I did not show the search-warrant to either of the defendants. I will admit that.

Q. That is not the purpose of it. I want to show exactly what you did state.

Mr. McDONALD.—This is very short,—just a few questions and answers. I should like to ask him.

The COURT.—It is not material. If he had not testified to that in direct, I would not have permitted you to have asked him about seeing the form of the bottles through the window.

Q. I asked you this question:

“Q. Are you positive that you announced that you had a search-warrant when you first hailed the boat?

A. Yes, I told them I had a search-warrant.

Q. It was in your pocket at the time? [111]

A. Yes, sir, I wasn't taking it out and waving it at that time.

(Testimony of S. C. Linville.)

Q. You did not wave it at them?

A. No, sir.

Q. At no time? A. No, sir."

Q. Were you asked those questions and did you give those answers? A. Yes, sir.

The boat was proceeding toward Stanwood. The town was about a thousand feet away. I understand that the river can be navigated an appreciable distance beyond Stanwood.

Redirect Examination.

The "Dragon" was tied up between thirty and forty-five minutes at Snaggy Point leaving there about 5:30, just before the seizure.

Testimony of Walter M. Justi, for the Government.

WALTER M. JUSTI, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is Walter M. Justi. I am a Federal prohibition agent, engaged in that capacity about seventeen months. On the 4th day of October, 1922, I participated in the seizure of the launch "Dragon" in the south fork of the Stillaguamish River near Stanwood, at about 5:45. This was at a point about a thousand feet from Stanwood. The defendants were on the boat at the time. The man sitting on the left of the bailiff is Chambers and the one further end of the row is Fredericks. About 219 sacks of various kinds of Scotch and

(Testimony of Walter M. Justi.)

American Whiskies and 32 sacks of Gordon gin, containing six bottles to the sack, were seized on the boat. Chambers was in the pilot-house when I first saw him, but at the time of the seizure he was in the cabin back of the pilot-house. The first time I saw the defendant [112] Fredericks was when he opened the window in the rear of the boat and put his head out and then slammed the window back. The next time was when he came into the pilot-house to take control of the boat and bring her into the shore. I first saw the "Dragon" on the 4th of October about three o'clock lying in the south channel of the river. I was on top of a silo on Hanson's farm on the north channel. We kept the boat under surveillance until we started up from the Hanson farm up to the east bank of the river where we lay behind a dike. That took about fifteen or twenty minutes, to go that distance. And during that time the boat was not under our view. I could not distinguish any people on the "Dragon" when I first saw it but later I saw persons raising an anchor. When I got to the Mat-terand farm, she was up at a point called Snaggy Point, where she anchored about four o'clock. She stayed there until about 5:30, when it came up the channel of the south fork toward Stanwood. It was seized about a quarter of six. The defendant Chambers was piloting the boat just before the seizure. Fredericks told me that at that time he was cooking some bacon and eggs in the galley, which was in the stern of the boat.

(Testimony of Walter M. Justi.)

Cross-examination.

Chambers was in the pilot-house of the "Dragon" when I first saw him. He was piloting the boat up the river. When I got on the boat, he was sitting on some sacks with his leg halfway out of the window. Every time I saw the boat when it was moving, it was moving toward Stanwood except at the time we halted her, she was drifting down the river away from Stanwood. The seizure took place approximately a thousand feet from the Stanwood dock. The river runs up above Stanwood a short distance. I don't know just where it ends. When the boat came up the channel about opposite where we were behind [113] the dike, we rose to the top of the dike and Agent Linville ordered the boat to stop saying, "We are Federal officers, stop that boat, we have a search warrant." Instead of stopping, the boat slightly increased its speed forward. Agent Linville fired a shot in front of the bow into the water at the same time repeated his command to stop. The boat finally stopped and Chambers said, "She is stopped now." We said, "Bring her into the bank." All the time we ordered them to stand where they were but the boat began to drift in the stream. It didn't drift very far. We walked down the dike to keep abreast of it, after repeating the caution to bring her into the shore. The defendant Chambers jumped through the door leading into the cabin back of the pilot-house. That is the first time that the shots were fired and then Fredericks called out,

(Testimony of Walter M. Justi.)

“Don’t shoot any more,” and Chambers said “I am shot; I am bleeding to death.” The boat was drifting at the time the shooting took place.

Redirect Examination.

Q. (By Mr. EMORY.) One further question: Were there any arms on board the boat?

Mr. DORE.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. EMORY.—Oh, I think counsel has brought out the question of the shooting and we have a right to show that they had the rifle on the boat.

The COURT.—We have already shown it.

Testimony of W. J. Griffith, for the Government.

W. J. GRIFFITH, witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is W. J. Griffith. I am prohibition agent and have been for a year. I participated in the seizure of [114] boat “Dragon” on October 4th, 1922, which took place about a thousand feet below Stanwood on the Stillaguamish River on the south branch thereof. The defendants were on the boat at the time. There were about 235 cases of whiskey and gin on the boat, I should think. I first saw the “Dragon” on the 4th of October about 4:30 at which time she was moored at some piles at Snaggy Point. I was behind the

(Testimony of W. J. Griffith.)

dike on Mr. Matterand's ranch. I had the boat under observation from that time until the seizure. When I first saw the "Dragon" I don't know whether there were any people on her or not. She was about a quarter of a mile or maybe a half a mile from where I was. About 5:30 she started up the south channel of the Staillaguamish River and got opposite where I was about 5:45. Agents Linville and Justi and Oscar Hanson, civilian, were with me at the time.

Q. (By Mr. EMORY.) Did you find any arms on the "Dragon" at that time?

Mr. McDONALD.—I object to that, your Honor, as already ruled upon by your Honor.

The COURT.—He may answer this question.

Mr. McDONALD.—Exception.

There were two Mauser automatic pistols with convertible stocks so that they could be converted into short rifles and two rifles. They were all loaded except the 38-55 rifle. The Mauser was on the pilot-house seat right by the steering wheel loaded and the others were in the bunk just back of the pilot-house door.

Mr. McDONALD.—Your Honor, will allow us an exception to all these questions so that we will not have to be continually repeating them.

The COURT.—I want you to record all your objections.

The same objection will stand to all this line of questioning. [115]

(Testimony of W. J. Griffith.)

Cross-examination.

The dike I mentioned is, I should judge, about six feet high. It holds the river off the adjoining farm land. The seizure took place shortly before six o'clock. At the time of the shooting, the boat was moving up stream in our direction. After it was ordered to halt, it went ahead a certain distance by its own momentum and then drifted about thirty feet down stream. We kept following it along the dike insisting that they bring the boat into the shore. There is quite a strong current at that point. With the exception of the time that I mentioned when it drifted, at all other times while under my observation it was proceeding toward Stanwood.

Testimony of Oscar W. Hanson, for the Government.

OSCAR W. HANSON, a witness produced on behalf of the Government, being duly sworn, testified as follows:

My full name is Oscar Hanson. I reside on my father's farm on the Stillaguamish river near Stanwood. I was present with Agents Griffith, Justi and Linville on the 4th of October when the launch "Dragon" was seized. The seizure took place pretty close to six o'clock. We were on the dike on Matterand's place. My father's farm is on the north channel and Matterand's farm is on the south channel. At the time of the seizure, the "Dragon" was proceeding north. Matterand's

(Testimony of Oscar W. Hanson.)

farm is on the east side of the channel. The seizure took place about a half or three quarters of a mile below the town of Stanwood. The defendants were on the "Dragon" at the time of the seizure. There were quite a number of sacks of liquor on the boat. I did not count them but the boat was pretty well loaded down with liquor. I have lived on my father's farm there between twelve and thirteen years. I saw the "Dragon" during the month of September. I saw [116] one of the defendants on the "Dragon" before the day in question. It was Mr. Fredericks. I saw him on the boat somewhere around the first part of September. I saw the "Dragon" on the 1st of October. She came out of the north channel and went west towards the sound. This was on the afternoon of Sunday the 1st, I should judge about three o'clock.

Testimony of Emil Olaf Matterand, for the Government.

EMIL OLAF MATTERAND, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is Emil Olaf Matterand. I am a farmer. I own a farm on the south fork of the Stillaguamish river near Stanwood. I was present at the time of the seizure of the "Dragon" by Federal officers on October 4th, 1922. It took

(Testimony of Emil Olaf Matterand.)

place about half-past five. The agents were stationed on my farm. I was about a hundred and fifty feet north of them. At the time of the seizure, the boat was coming up from the south and going north. The defendants were on the boat at the time of the seizure. I first saw the "Dragon" on October 4th after she left Snaggy Point. The boat reached the city dock at Stanwood at six o'clock. The boat was loaded down with liquor at the time it was seized. The liquor was contained in sacks. I did not count them. I saw the "Dragon" all through the summer. I saw the defendants on the "Dragon" during the month of September. I have lived in Stanwood all my life. During the month of September, I could say with certainty that I have seen the defendants four times together on the "Dragon."

Q. Did you ever see them take any liquor off the "Dragon"?

Mr. DORE.—Objected to as incompetent, irrelevant and immaterial. [117]

The COURT.—Objection sustained.

Mr. EMORY.—May it please the Court—

Mr. DORE.—Before we have any speeches, I suggest that the jury be excused.

The COURT.—Is this one of the acts laid in the indictment.

Mr. DORE.—No.

Mr. EMORY.—I have authorities that we can show overt acts that are not charged.

(Testimony of A. W. Johnson.)

The COURT.—Unless this is one of the offenses charged in the indictment, it will not be permitted.

Mr. EMORY.—I have authority here to the contrary.

The COURT.—Oh, you have not. I don't care to argue it. I granted a new trial some time ago because I permitted the district attorney to introduce testimony as to a former occurrence.

Testimony of A. W. Johnson, for the Government.

A. W. JOHNSON, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is A. W. Johnson. I am a clerk in the Federal prohibition office. I have been employed there since March 1, 1920. I arrived in Stanwood about 2:30 o'clock on the morning of October 5th after the seizure of the "Dragon." Between twelve and one o'clock on that day, I heard a statement made by defendant Chambers with reference to his connection with the transaction. It was made at Dr. Starr's hospital. Agent Regan, Mr. Chambers' father and myself were present at the time. It was made in Mr. Chambers' room at the hospital. Mr. Regan told Chambers that anything that he might say would be used against him in any trial that came up in connection with the case. Chambers said in the [118] first place that he had an interest with Fredericks in the boat. Later, however, when his father was present and said to him,

(Testimony of A. W. Johnson.)

“Now you tell the exact truth or facts as they occurred,” then it was that Mr. Chambers stated that he was employed as an engineer on this boat, that he had made two trips and that his compensation was \$25.00 a trip as engineer and that he had no interest in the boat. He said the liquor was gotten at Pender Island. I do not know the exact location of that island but I know it is somewhere in the Canadian waters. He said Mr. Fredericks employed him.

Cross-examination.

He said that he was employed as engineer on the boat at \$25.00 a trip. And that was all the interest he had in it. I did not state to Chambers before he made his statement that it would be better for him and he would get off easier if he told me what he knew about the matter. He was in bed. Regan and Mr. Chambers' father were in the room besides myself. He did not impress me as suffering at the time. This interview took place about one o'clock in the afternoon of the fifth, the day after the shooting. He said he got this particular liquor at Pender Island.

Testimony of Leonard Regan, for the Government.

LEONARD REGAN, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is Leonard Regan. I am a Federal prohibition agent. I went to Stanwood in company

(Testimony of Leonard Regan.)

with Mr. Johnson and visited Mr. Chambers on the 5th of October at Dr. Starr's hospital there. We went to Chambers' room about 1 o'clock, where he made a statement with reference to his connection with the "Dragon." We went into the room in company with Mr. Chambers' father, asked a few [119] questions, warned him of his constitutional rights, told him he did not need to talk if he did not want to, we asked some questions about the ownership of the boat,—if he was a full partner with Fredericks,—and at first he said he was. Then his father warned him to tell the truth; he said, "Tell these men the truth; it will be a great deal better for you." Then he told us he was employed by Fredericks and was getting \$25.00 a trip and that this was one of three trips that he had made to Pender Island. This was the last of the cache. I also asked him about the number of cases of liquor. He couldn't give me a definite answer but said it was the last of the cache. He thought about 235 cases. He said it came from a cache in British Columbia just across the line.

Cross-examination.

During all this conversation, Mr. Chambers' father was present and heard it all.

Testimony of C. W. Kline, for the Government.

C. W. KLINE, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is C. W. Kline. I am a Federal pro-

(Testimony of C. W. Kline.)

hibition agent engaged in that service over four years. During that period, I have spent a great deal of time in testing seized liquors for their alcoholic content. Government's Exhibits 1, 2 and 3 (bottles of whiskey) were turned over to me on the 6th day of October and have been in the vault ever since. Government's Exhibit 2, for identification, is a hundred proof, 50% alcohol. Government's Exhibit 3 is the same. Government's Exhibit 1 is 90 proof, 45% alcohol. (Whereupon Government's Exhibits 1, 2 and 3 were offered in evidence and were by the Court admitted over the objection of the defendants that they were seized in violation of their constitutional rights. [120] Objection denied and exception to defendants allowed.) Government's Exhibits 4, 5, and 6 were turned over to me October the 6th. No. 5 is a 100 proof, 50% alcohol, as is also Exhibit No. 4. No. 6 is 90 proof, 45% alcohol. (Whereupon said exhibits are received in evidence over same objection of defendants and exception noted.) Government's Exhibits 7 and 10 for identification were turned over to me on October 6th. No. 7 is 90 proof, 45% alcohol, as is also No. 10. (Whereupon Government's Exhibits 7 and 10 are received in evidence over the same objection of defendants and exception allowed.) Government's Exhibit 8 is a bottle taken out of the sack (Government's Exhibit No. 9) by me this morning. All of these bottles contained liquor fit for beverage purposes. (Whereupon Government's Exhibits 8 and 9 were received in evidence

over defendants' same exception and exception allowed.)

Thereupon the Government rested.

Thereupon the defendants, by their counsel, moved for a directed verdict of not guilty under Count I, upon the ground that no competent evidence had been introduced, which tended to establish the overt act laid in the indictment. The defendant Fredericks further moved for a directed verdict of not guilty under Count I on the ground that if the Court should hold that the statement made by Chambers as to the liquor being brought from British Columbia was competent to establish the overt act, as against Chambers, it could not establish the overt act as against Fredericks, said statement being made after the termination of the alleged conspiracy. Both of the defendants also moved for a directed verdict in their behalf upon Count II of the indictment wherein they are charged with importing liquor from British Columbia upon the ground that without other evidence of the *corpus delicti*, i. e., the importation other than [121] the finding of the liquor, the alleged confession of Chambers was insufficient to bind him and could in no event bind Fredericks because made in his absence. Defendant Fredericks also moved separately for a directed verdict in his behalf upon Count II of the indictment wherein he was charged with importing liquor from a foreign country upon the ground that the evidence was not sufficient to bind him and there was a total failure of proof thereof. Thereupon said motions were argued by

(Testimony of Joseph Fredericks.)

counsel for the said defendants and the Government and at the conclusion of said arguments the Court orally rendered the following ruling:

The COURT.—“This is the way I feel about the issue that is presented now. I don’t think the motion is well taken as to Count I. I think the testimony is sufficient to bring the case within the overt acts charged. Now, as to Count 2,—the importation,—that is in a different class and sustains a different relation. I believe it to be the duty of the Court in a case of this kind where all of the facts are so interrelated as they are here to withhold conclusion until the whole testimony is before the Court and that will be the conclusion now arrived at. At this time the motion will be denied as to all of the counts and all of the motions. The motion may again be raised for a directed verdict at the conclusion of all the testimony.”

Mr. DORE.—Please note an exception.

Thereupon Donald A. McDonald, having made a statement to the jury, on behalf of the defendants, the following evidence was thereupon offered for them:

Testimony of Joseph Fredericks, in His Own Behalf.

JOSEPH FREDERICKS, appearing as a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination.

My name is Joseph Fredericks. I live in Seattle now. [122] I am thirty-nine years old. I have a family. I was born in Snohomish County and lived

(Testimony of Joseph Fredericks.)

there until I was about three years old, when I moved to Skagit County. I used to have a boat business. I worked for the Pacific Coast Milk Co. for five years. I own land in Skagit County and farm it. I ran a boat for the Pacific Coast Milk Co. for about four or five years hauling milk. I towed logs for a mill company for about four years. Defendant Chambers and I were in business together in the Lummi Bay Packing Co. We hauled fish one summer. The launch "Dragon" was the property of myself and Chambers. We used it at first to go back and forth to the cannery. And also used it for pleasure and hunting. I operated the boat myself. It could go about seven miles an hour and could not withstand rough water. It was old, being built in 1906, and is pretty rotten now so that it leaks badly. I have been living in Seattle about four months, coming here just a few days prior to this occurrence. I arrived in Stanwood on Saturday afternoon, the last day of last September. My purpose in going there was to go hunting with Mr. Chambers. The duck season opened on the 1st day of October. The launch "Dragon" was tied up at the dock at Stanwood. We started out on our duck hunting trip shortly after noon on October 1st. We went to the mouth of the north ford of the Skagit river. It was low tide when we got there and we had to wait there until about eleven o'clock that night, at a place known as the "Hole in the Wall," which is at the south end of the Swinomish slough. We borrowed a boat there from a man by the name of George Falk, a fisherman. We tied this

(Testimony of Joseph Fredericks.)

boat behind the launch. The tide was right about midnight. We went through from the "Hole in the Wall" and on through Swinomish slough out into Modella Bay and from Modella Bay to Joe Leary's slough. It is marked on the map [123] Olympic slough (Defendant's Exhibit "A"). We arrived there about two o'clock in the morning. We anchored and went to bed. We had arrangements for sleeping on the boat. We got up the next morning about half-past seven. We noticed when we got ready to go duck hunting that our rowboat was gone. We then decided to go back to Swinomish slough and see if we could find it. We went back and started through the slough as soon as the tide raised again. This was about ten o'clock. We reached the place where the Great Northern Railway bridge crosses the north entrance of the Swinomish slough about eleven o'clock. We saw a man by the name of Barrett there and the bridge-tender, a man by the name of Jackson. When we saw these men on the bridge, Barrett hailed for us to stop. As we went to stop, we burned out our magneto and ran on a bar in the channel, because the tide was not yet full. When the magneto went wrong, we did not have any control of the power on the boat. Barrett was brought out to us by the bridge-tender in his row-boat. Both of them came on board our boat. Barrett was hunting at the time. He had a rifle with him. We were in this difficulty on the sand bar from eleven o'clock until about four o'clock in the afternoon. We took the magneto off the engine and Mr. Chambers took it into Mr. Vernon to get it fixed up. About four o'clock

(Testimony of Joseph Fredericks.)

we got the boat repaired and started for La Conner arriving there a little after five o'clock. We took on some gasoline at the gas station. I got a receipt and left it on the boat at the time it was seized. After we got this gas, we called up Mr. Tjesland, a farmer out in the country that we knew and asked him to come in to La Conner and take us to Stanwood. He came in and was on board of our boat. He had an automobile and took us to Stanwood, where we arrived between eight and nine o'clock. Our purpose in going there was to get a magneto at the Palace Hotel. We saw Mr. Albert Cort, the man who runs the hotel there. [124] We took a magneto and I borrowed a rifle from Cort. We left around twelve o'clock. Tjesland, Chambers and myself then returned to La Conner, arriving there about one o'clock. We left Stanwood on October the 1st, left Stanwood at midnight on the 2d and got back to La Conner about one o'clock in the morning of the third. We slept on the boat at La Conner that night. We got up about six o'clock on the morning of the 3d and went out to the fish traps. This fish trap was Mr. Heblloom's. We met Harry Rock there at his wannegan. A wannegan is a scow with a house on it used on all fish traps for men to live in. When we got there, Harry Rock was in bed. He had just gotten up when we got there. We got a rowboat from him about nine o'clock and went hunting. We were out all day until about four o'clock in the afternoon, when we returned to Harry Rock's place and tied up our boat

(Testimony of Joseph Fredericks.)

at his wannegan. We had gotten a few ducks and cooked them and all three of us had supper there together. After which we sat around and talked and played the phonograph on the launch. He stayed with us on the launch until about eleven o'clock when he went to work about his trap and then to bed. Along about half-past three a fellow came and hollered at the boat and I got up to see who he was and he said he was broke down and wanted to know if I could not help him out. I told him I didn't know, I guessed I could, and asked him what the matter was. He said that he had a little cargo of stuff that he wanted to take into Stanwood. He wanted to know if I could take it in for him and I told him I would. He went to work and loaded it in the boat. Mr. Chambers was in bed asleep in the engine-room at the time. The launch that was broken down was anchored just off what is known as Skagit Island. As far as I know Mr. Chambers was not awake at any time while they were putting this stuff on board. After the boat was loaded we went in toward Stanwood. We went in through the north fork, as we did so [125] we met the boat "Lily" in charge of Captain Whalen. We put the fellow, who owned this stuff off on the bridge. He told me that he would meet me at Stanwood at the dock. As soon as he got off, I started on to Stanwood. We got up there pretty near to the dock and the engine shut down again. The magneto went bad. The bridge at which this man got off was about three-quarters of a mile from the city dock at Stanwood.

(Testimony of Joseph Fredericks.)

This trouble with our magneto developed just about opposite the sawmill in Stanwood. I tried to fix it again. In the meanwhile the boat kept drifting down the river. It drifted out of the south channel to what is known as Red Light. We got on the tide flats there, the tide was going out and we had to wait for six hours before the tide came up. We then started back into Stanwood, about four o'clock. We had more trouble with our magneto and tied up at Snaggy Point. We got it fixed up again and started on in toward Stanwood. It was then the Federal Agents held us up. I could not hear everything they said as I was in the back of the boat cooking supper, but their shooting and hollering attracted my attention. I didn't pay any attention to this shooting because it was duck shooting time and I thought it was hunters. Mr. Chambers knew nothing about these sacks being put on board or that they were going to be on board.

Cross-examination.

I do not go duck hunting often in the "Dragon." It is not an expensive boat to go hunting in. I am a farmer now. I have lived in Seattle for the last four months and was at the time of this occurrence. I do not know the name of the man who loaded the liquor on the boat. I never saw him before. I did not know what it was that was being loaded in the boat at the time. I did not help load it on. I was in the engine-room at the time. They brought it through the engine-room. I saw them bring the sacks through. I did

(Testimony of Joseph Fredericks.)

not know it was liquor. I did not see [126] them bring as much as 219 sacks on board. It took about forty minutes to load it. It took two men, who I did not know to load the boat. It took them forty minutes. Chambers was part owner in the boat. I did not get his permission to load the boat. I did not know that it was contraband or rendered the boat subject to seizure. I did not know it at the time the boat was seized by the Federal agents.

**Testimony of Clarence Chambers, in His Own
Behalf.**

CLARENCE CHAMBERS, appearing as a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination.

My name is Clarence Chambers. I live at La Conner. I am thirty-one years old. I was born at La Conner and lived there all my life. I have been helping my father on his farm. This farm is about a mile east of La Conner. Prior to the time I joined the army in 1917, I was a fisherman for seven or eight years. I have known Fredericks for the past three or four years. We were interested together in the Lummi Bay Packing Company. We hauled fish for the company in 1921. I had an interest in the boat "Dragon." I came down to Stanwood on Saturday, September 30, 1922. We got the boat in shape to go hunting. We left Stanwood about one o'clock. We went out the

(Testimony of Clarence Chambers.)

north fork of the Stillaguamish River to the "Hole in the Wall" and borrowed a rowboat and laid there till the tide raised about twelve o'clock that night. We then went off to the east of Hat Island, through the Swinomish Slough. Our purpose in going there was to hunt ducks and geese. We went to bed that night and early in the morning we got up and found we had lost our rowboat and started back to La Conner to look for it. We arrived at La Conner between five and six o'clock. We broke down at the Great Northern bridge and were hung up about four hours. When we got to La Conner, we called up Oscar Tjesland and had him take [127] us to Stanwood in his auto, where we got another magneto. We got to Stanwood about nine o'clock. We borrowed a rifle from Mr. Cort. We got back to La Conner about one o'clock next morning. We slept on the boat. About six o'clock the next morning we went around Skagit Island to a fish-trap and tied up. We met a man named Rock there. This was on the third. We got his rowboat and went out hunting that day. We returned about four in the afternoon. Rock came aboard and had supper with us. We went to bed between eleven and twelve o'clock. I did not wake up until about 7 o'clock next morning, when we were right off Stanwood on the mud flats, high and dry. We got off the mud flats about one or two o'clock. We started for Stanwood about three o'clock, had trouble with the engine again, stopped at Snaggy Point, fixed it up and started on up for Stanwood. I was steering the boat. The next

(Testimony of Clarence Chambers.)

thing that happened was that four or five men popped up from behind the dike. They used the foulest language I ever heard in my life and then commenced shooting. I was shot and put in great pain. I was taken to the Stanwood hospital. Mr. Regan came to see me at the hospital. The same leg that was shot was hurt while I was in the airplane service in the army. I was suffering great pain while Regan was there. I said nothing to Regan except that I didn't want to talk to anyone. I did not say I had been to Pender Island. I don't know where Pender Island is and was never there.

Cross-examination.

When I got up on October 4th, I noticed some gunny-sacks on the boat. I have no idea how many there were. I did not ask what they were. I owned a half interest in the boat. I got up at 7 o'clock. The boat was seized at 6 o'clock. In some places the gunny-sacks were piled within two feet of the ceiling. In order to reach the galley where I was when the [128] officers first apprehended the boat, I had to crawl over sacks to get back to the galley. I did not notice they contained bottles. I did not know what was in the sacks. I do not know whereabouts in Stanwood they were to be unloaded. I want the jury to believe that I did not mention the sacks from the time I got up till the boat was seized. Fredericks did not tell me about some third parties loading the sacks on the boat.

Testimony of Jess Hall, for Defendants.

JESS HALL, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

My name is Jess Hall. I live at Stanwood. I am in the transfer and auto hire business. I have lived there all my life. I know the defendants. I saw them in Stanwood October 1st about one o'clock. They were leaving Stanwood on a boat. They were talking about going hunting. I next saw them on the night of October 2d in front of the Palace Hotel about 11 o'clock at night.

Cross-examination.

I know it was the first of October that I saw the defendants in Stanwood because that was the day the duck season opened and everybody was going hunting. I have never been convicted of a felony.

Testimony of Albert Cort, for Defendants.

ALBERT CORT, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

My name is Albert Cort. I live in Stanwood. On the first day of October last, I was running the Palace Hotel at Stanwood. I have known the defendants for ten or fifteen years. I saw them in the town of Stanwood on the 2d day of October [129] between ten and twelve o'clock in the even-

(Testimony of Albert Cort.)

ing. They were at my hotel. They got a magneto they had left there and borrowed my rifle.

Cross-examination.

I never owned a couple of Mauser revolvers with convertible stocks.

Testimony of Frank Jackson, for Defendants.

FRANK JACKSON, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

My name is Frank Jackson. I live on the Anacortes branch of the Great Northern Railway at Bridge #12. It crosses the Swinomish Slough at the north end. I saw the defendants once before. They were aboard the boat between the two bridges. It was some time the first part of October. I was aboard the boat for a few minutes. I saw no gunny-sacks or anything in the boat. It was empty. I went on board because there was a man on shore who wished to go out there and I kept the boats and rowed him out.

Cross-examination.

I could not swear the exact day but I think it was the first week in October.

Testimony of Oscar Tjesland, for Defendants.

OSCAR TJESLAND, a witness produced on behalf of defendants, being duly sworn, testified as follows:

Direct Examination.

My name is Oscar Tjesland. I live at Mt. Vernon and am a farmer. I have known the defendants all my life. I saw the defendants the 2d day of last October at La Conner about 7:30 o'clock in the evening. They were on the boat "Dragon" tied up at the Standard Oil Dock. I saw no gunny-sacks [130] or cargo on the boat. It was empty I stayed on the boat about half an hour. We then went to Stanwood. The defendants got a magneto and a rifle there. We drove back to La Conner, arriving there about midnight. I did not go on board the boat then.

Cross-examination.

I have been a farmer all my life. I remember it was the second of October that I saw them because they were arrested on the 4th and I know it was two days before that.

Testimony of Harry Rock, for Defendants.

HARRY ROCK, a witness produced on behalf of defendants, being duly sworn, testified as follows:

Direct Examination.

My name is Harry Rock. La Conner is my home. I have lived there 26 years. I was born there. I

(Testimony of Harry Rock.)

am a fish-trap foreman. During the first week in October, 1922, I was working on a fish trap in Skagit Bay, about four miles west of the "Hole in the Wall." I remember hearing about Chambers being shot. I saw the defendants on October 3, 1922. Between 7 and 8 o'clock in the morning they came and tied up at my house boat. They borrowed a skiff from me. They said they were going hunting. They pulled out and went south. About 5 o'clock I saw them back at my house boat and I had supper with them. I stayed with them until about eleven o'clock that evening. We talked and listened to the phonograph they had on the boat. I saw no sacks or any cargo on the boat. It was empty.

Testimony of Henry Whalen, for Defendants.

HENRY WHALEN, a witness produced on behalf of defendants, being duly sworn, testified as follows:

Direct Examination.

My name is Henry Whalen. I am the captain of the [131] boat "Lilly." It is a towboat. I was crossing the flat with a tow of logs about 6 o'clock in the morning, when I saw the boat "Dragon" entering the north channel of the Stillaguamish River.

Testimony of Samuel Chambers, for Defendants.

SAMUEL CHAMBERS, a witness produced on behalf of the defendants; being duly sworn, testified as follows:

Direct Examination.

My name is Samuel Chambers. I live in La Conner. My business is farming. I have lived in La Conner thirty-four years. I am the father of the defendant Chambers. I was present in Dr. Starr's hospital on the afternoon after my son's arrest. A man named Johnson and a man named Regan were present. I heard the conversation that took place between my son and those men. My son was suffering pretty bad at the time. He could speak distinctly. I got there about 11 o'clock in the forenoon. He was taken there the night before. Regan and Johnson asked him where he got the whiskey. He said he did not know where they got it and just groaned. This Government man they called Johnson said, "You had better tell the truth, because it will be easier for you." He just lay there and turned over on his side and groaned. That is about all that was said or done there. He made no statement that he got the liquor at Pender Island. I heard no statement about Pender Island. I heard what was said. My son was in a great deal of pain. It was the same leg that he had hurt when his airplane fell.

Cross-examination.

I cannot tell you whether my son was back in

(Testimony of Samuel Chambers.)

Stanwood a week later. I know he went from the hospital on crutches and I wanted him to stay there for a while. This man Regan jumped and roared around and said, "We will have to put officers over [132] him." I was in the room all the time the officers were. They went out of the room before I did. They went into a private room. I don't know whether they came back. I went to get a pair of pants for the boy.

Thereupon both sides rested.

Thereupon the jury was excused while counsel for defendants presented legal matters.

Thereupon the defendants each severally moved that a verdict of not guilty be returned as to him, or in the alternative that Count I be taken from the jury and a verdict of not guilty be directed, on the ground that there was no evidence to establish the only overt act alleged, the importation from Canada, except the alleged statement of Chambers, which was not sufficient as to Chambers on the ground that the *corpus delicti* cannot be proved solely and exclusively by a confession and as to Fredericks for the additional reason that the statement of his codefendant Chambers after his arrest and in his absence could not be considered as against him. As to Count II each defendant severally moved in the alternative that the court direct a verdict of not guilty, Fredericks for the reason that there was no testimony that connected him with any importation, except the statement made by his codefendant after his arrest and in his ab-

sence, and Chambers for the reason that the *corpus delicti* cannot be proved solely and exclusively by a confession. And if the foregoing motions were denied, the defendants moved that the Government be required to elect between the conspiracy and the other three counts in the indictment.

Thereupon the Court orally ruled as follows:

The COURT.—I think the motion should be sustained as to Count Two as to each defendant. There is aside from the statement alleged to have been made by the defendant Chambers [133] no testimony before the Court that this was imported, and the statement of Chambers cannot bind Mr. Fredericks upon the importation; and there is nothing establishing the *corpus delicti* aside from the statement. As I understand the law, there must be some evidence of some kind to establish the *corpus delicti* before the confession could be applied.

Mr. DORE.—Would it be proper to ask your Honor what you consider the evidence is as to Count One, so we can make our argument conform?

The COURT.—Oh, yes, there is testimony as to Count One. The motion is denied as to Count One, the conspiracy charge. Of course, we all understand that at common law a conspiracy or crime was complete upon the act of conspiracy being entered into without any other act; but under the act of Congress,—section 37,—some overt act is necessary to carry into effect or carry forward the conspiracy before it is an offense. Now, that overt act may be any act the most minor. Proof of any sort of an act on the part of a person,—a word

would be sufficient, a writing, a movement of any kind. I would say here that while this indictment charges the conspiracy was entered into on the fourth of October, the Government is not bound by that date. The conspiracy may have been entered into any time within the period of limitations of three years. There is testimony here as to the activity of the defendants with relation to this vessel prior to this time in the month of September, and likewise in the month of October. The overt acts charged here are that "After the formation of the conspiracy in pursuance of in order to effect the object of this conspiracy, said conspirators,"—naming them,—“on or about the 4th day of October did knowingly, unlawfully, carry and transport in [134] and on a certain gas boat known as the ‘Dragon’ to a place in Stanwood.” The charge is that they lived in Stanwood, that the conspiracy was entered into at Stanwood, and they moved down the river. Any sort of a movement effectually would be sufficient. So that there is ample testimony here with relation to the overt act, if a conspiracy was entered into, for the purpose of effecting the offense. That is a matter for the jury to determine.

Mr. DORE.—We may have an exception, of course.

Mr. McDONALD.—Your Honor holds that the law to be that the overt act need not be proved as laid?

The COURT.—Oh, no.

Thereupon the jury returns to the jury-box, whereupon the Court instructs the jury to return a verdict of not guilty as to both defendants as to Count Two, the Court saying:

“There is no testimony here that this liquor was imported except the statement of the defendant Chambers testified to by the witnesses for the Government, if that was made, which is denied. The statement would not be admissible as against Fredericks because it was made in his absence, and would not bind him; and as against Chambers himself under the law there must be some evidence of importation before even his statement would bind him. So as to both defendants the motion will be granted as to Count 2, but denied as to the other counts. So the counts for the jury’s consideration will be the conspiracy count and the possession and transportation counts.”

Thereupon, defendants by their counsel duly excepted to the denial of their motions other than as to Count 2.

Thereupon, after argument by counsel for the Government and the defendants, the following instructions were given by the Court: [135]

Instructions of the Court to the Jury.

Gentlemen of the Jury:

The defendants are charged in four counts in this indictment with a violation of the laws of the United States. Count 2 has been withdrawn from your consideration. That leaves Count 1 and Count

3 and Count 4. Count 4 charges the transportation of intoxicating liquor contrary to the National Prohibition Act, and Count 3 charges the possession of the same liquor. The defendants are guilty of both Counts 3 and 4 or not guilty of those two counts, because the transportation of course must likewise include the possession.

The defendants have each pleaded not guilty as to each count in the indictment. That means they are denied. They are presumed innocent until they are proven guilty beyond every reasonable doubt. The burden is upon the Government to prove that they are guilty by this degree of proof. You of course know what transportation means. You likewise know what possession means. If they transported the liquor in the boat, if you believe the testimony of the witnesses for the Government that this liquor was in the boat, and the defendants say that they had charge of the boat, and if they knew what was in the boat, and knew this was liquor, then they are guilty of Count 3 and Count 4.

Upon Count 1 you have a more difficult issue to determine. This count is drawn under a section of the United States statute which provides that if two or more persons conspire to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effectuate the object of the conspiracy all of the parties entering into the conspiracy are guilty. In order to be guilty under this section of the statute, it is not necessary that the Government lose anything. It is sufficient if the conspiracy is to violate a law of the

[136] United States, and the charge in this case is that it is a conspiracy to violate the National Prohibition Act.

Now, then, in the proof submitted it is not necessary that the Government prove that a formal agreement was entered into between the parties, or that the matter had been formally discussed by them and agreed upon between them as to each part that each shall do. It is sufficient if there was an understanding between the parties as to the particular thing to do to accomplish, and each of the parties so regulated his conduct and co-operated with the other as to effect the object of the conspiracy. The gist of this case is the conspiracy, and the effectuating of an object to carry it out,—the doing of some act which will effectuate the object of the conspiracy.

In order to establish a conspiracy there must be three things established. One is the conspiring together, the co-operating, the confederating, the conduct of the parties that so interrelate into each other as to preclude a conclusion other than that there was a conspiracy and understanding to do the particular thing that is charged. And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the National Prohibition Act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down the stream, or it might be carrying a cargo or the prohibited commodity in a boat. It might be any

minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the Government establish all of the overt acts charged. It is sufficient if they have proved one act that would carry forward the conspiracy.

Conspiracy is sometimes denominated by law writers as [137] a partnership in crime. Now, in a civil partnership one partner binds the other by his acts and his statements with relation to matters within the partnership business. So in a criminal conspiracy every person entering into a conspiracy is a partner in that conspiracy, and whatever he does or whatever he says during the continuance of the conspiracy binds the other party; but after the conspiracy is ended or consummated then the partnership ceases and a party cannot bind the other by any statements that he may make or anything that he may do.

Now, in this case the Court permitted a statement that was testified by witnesses on behalf of the Government as having been made by the defendant Chambers with relation to what they were going to do and how it was to be carried forward. Now, that statement may be received against Chambers alone. That statement may not be received or considered by you as against Fredericks, because at the time the statement was made the conspiracy, if one had been entered into, was consummated. So that in your deliberations in this case you will not consider the statement made by Chambers as against Fredericks. But you will consider all of

the acts they did, the relationship between the parties, the co-ownership with relation to the boat as testified to by both parties, and all of the matters and their conduct during the time that is covered by the testimony and charged in the indictment.

The indictment charges the conspiracy to have been entered into on the fourth day of October. Now, it is not necessary that the conspiracy be proven as entered into upon that date; it is sufficient if the testimony shows that the conspiracy was entered into by these parties at any time within three years. But there is no testimony in this case that goes farther back than the month of September of the year in which the conspiracy [138] is charged with relation to the conduct of these parties.

The Court withdrew,—as I stated a moment ago briefly,—Count 2. There is a difference between Count 2, importation, and the conspiracy count. Now, a conspiracy may be completed and effected without bringing in a drop of liquor as charged. Without bringing in any liquor, if the parties entered into a conspiracy to violate the National Prohibition Act, to import liquor from British Columbia, and one of the persons then does anything to effect that object,—this is simply for the purpose of illustration,—if he writes a letter to carry forward, or if he runs a boat around the bay, if he does anything,—it is immaterial what it is,—to effect the object of the conspiracy, why then the offense is complete without bringing in any of the liquor. But to import any liquor into the United

States, that means to bring it in. They must actually bring the liquor in before they would violate the importation act. But under the conspiracy act, that is not necessary. I merely go a little into that detail because of the argument that was made before you by counsel for the defendants.

Now, you are instructed that the defendants in this case contend there was no conspiracy, and that there was no object or act done by them to effect the object of any conspiracy; and then they seek to account for all of the time that was covered by the testimony on the part of the Government with relation to what they did, and that what they did was not for the purpose of carrying forward any conspiracy but was in another enterprise entirely; and if they have accounted for their time and if they have been elsewhere and show the relation they sustain is in harmony with proper deductions and reasonable conclusions to be drawn from the circumstances detailed by the witnesses on the part of the Government, or of course if it is sufficient to [139] raise a reasonable doubt in your mind you will resolve that doubt in favor of the defendants in this case upon that count as well as the other counts.

Now, as to Counts 3 and 4, the defendants may be guilty upon Count 3 and Count 4 and not guilty upon Count 1. If the defendants did not enter into any conspiracy and brought this whiskey into Stanwood, then it is immaterial where they got it. They say it was loaded on the boat out on the water,—you will understand the testimony,—in the vi-

cinity of La Conner or this *sie*, and if it was they would be guilty. It is, I guess, conclusively established that it was in the boat. Of course, if they didn't know that it was whiskey, they would not be guilty even if it was in the boat; but it is for you to say whether there is any credence to be placed on their testimony that they didn't know. You are the judges of what the weight of the testimony is. You should try this case fairly, as I know you will. If you have a reasonable doubt as to whether these defendants entered into a conspiracy you will return a verdict of not guilty as to Count 1. If you are convinced beyond a reasonable doubt of their guilt upon Counts 3 and 4, you will return a verdict of guilty upon both these counts as to both these defendants.

A good deal was said and emphasis placed in argument upon the fact that one of the defendants was a soldier in France. We honor him that, Gentlemen of the Jury, and I regret that I must refer to it. Any man who served his country on the battlefields of France,—you have sons and so I have,—is entitled to all the credit in the world. But that does not give anybody any license to come back here and violate the laws of the United States and disgrace the flag of his country after he pledged his life in its defense. I don't like for any man to get before a jury of intelligent citizens and try to defend a man on that [140] ground. We have nothing to do with the law,—neither you nor I; we have simply to do with its enforcement. God forbid that we shall ever arrive at a point

where courts and juries will not function in administering the laws of the country; because when courts and juries fail to function, then, Gentlemen of the Jury, this Government will have pretty nearly run its course. It is the keystone in the arch of the safety of the country. I merely want to impress that. That keystone means liberty for the defendant, means justice for him, means everything, means every presumption in his favor; but it doesn't mean anything else.

Now, then, I want you to consider this case fairly, as I know you will. If you have a reasonable doubt in your mind as to the guilt of the parties upon that first count, then return a verdict of not guilty in that case, because the Government doesn't want the defendants convicted unless they are guilty,—unless you twelve men are convinced beyond a reasonable doubt that they are guilty; but if you are convinced beyond a reasonable doubt that they are guilty, then it is your duty to return a verdict of guilty. And on the other counts, you will give them the same consideration as I have indicated you should give on Count 1.

A reasonable doubt, Gentlemen of the Jury, is just such a doubt as the term implies; it is a doubt for which you can give a reason. It is such a doubt as would cause a man of ordinary prudence, sensibility, and decision in determining an issue of like concern to himself as that before the jury to the defendants, to pause or hesitate in arriving at a decision. It is not a speculative, imaginary, or conjectural doubt. It is a doubt that is created

by the want of evidence, or it may be created by the evidence itself. A juror is satisfied beyond a reasonable doubt when convinced to a moral certainty of the guilt of the [141] party charged.

The COURT.—I believe I have covered the case. Are there any exceptions?

Mr. DORE.—The defendants at this time except to that part of the Court's instructions wherein the Court, in words or in substance, stated that to convict the defendants on Count 1 of the indictment it was not necessary that the Government offer any proof or that the jury should find any evidence to sustain the proposition that any of the liquor that was transported on the boat "Dragon" had ever been in Canada, or had been imported from Canada; that in the absence of any evidence in the case that the defendants ever brought said liquor from Canada the defendants might be convicted.

The defendants, and each of them, except to that part of the Court's instructions which, in words or in substance, was to the effect that it was not necessary for the Government to prove the overt act as alleged in the indictment; that if the Government had proved that the "Dragon" at any time during the month of September left Mt. Vernon, or that any liquor had been carried on it at any time, that would be sufficient.

The defendants except particularly to the illustration given by the Court, in which the court said it was not necessary to establish the fact that any of the liquor had been imported from British Columbia in order to convict the defendants on

Count 1 of the indictment; that if they went down the river on the boat together, but did not speak a single word, that anything in the case that showed an agreement between them, any minor thing that tended to effectuate the object of the conspiracy, would be sufficient.

The defendants in taking these exceptions call the [142] Court's attention to the fact that, although as an abstract proposition of law it might be correct as to another indictment, whereas in this one, where only one overt act is alleged, the instruction is erroneous and vicious in telling the jury that the overt act need not be proved as laid. The defendants contend that if a number of overt acts had been laid in the indictment, proof of only one would be sufficient, but where only one has been laid, it must be proved as laid.

The defendants except to that part of the Court's instructions which, in words or in substance, are to the effect that where a conspiracy has been formed, any person who enters into the same and contributes to the object of the conspiracy is guilty. They call the Court's attention to the error therein contained because the Court had failed to state that before a person entering into a conspiracy or doing an act that contributes to effectuate the object of the conspirators can be guilty he must have knowledge of the existence of the conspiracy, and that the act that helps in the accomplishment of its object is done knowingly and with the intention of bringing about the accomplishment of the conspiracy.

The defendants except to that part of the Court's instructions wherein the jury is told that it is not necessary to prove an overt act as laid, that anything that tends to effectuate the object of the conspiracy, regardless of whether it is alleged or not, would be sufficient, and that any minor thing whatsoever that the jury might find tended to effectuate the object of the conspiracy would be sufficient.

The defendants except to each and every part of any instruction wherein it is by word or inference suggested to the jury that the burden is not upon the Government to prove the [143] single overt act is laid in the indictment.

The COURT.—The exceptions will be noted. Of course, the jury understands that an overt act is of no consequence, or any act is of no consequence, unless the conspiracy is entered into. Before any act can be considered as an overt act, the jury must conclude that a conspiracy has been entered into as charged.

Mr. McDONALD.—Defendants also except to the failure of the Court to give their requested instruction No. 21, wherein they request that the Court instruct the jury that the overt act must be proved as laid.

The COURT.—Note the exception.

Mr. McDONALD.—Also the defendants except to the failure of the Court to instruct the jury on the presumption of innocence.

The COURT.—Oh, yes, I instructed them that the defendants are presumed to be innocent until

proven guilty beyond every reasonable doubt; and that the burden is upon the Government to prove guilt by that degree of proof.

Mr. McDONALD.—We also except to the Court's failure to instruct the jury on the credibility of the witnesses.

The COURT.—Yes, I think I omitted that. I will instruct on that.

You are the sole judges of the fact in this case, and you must determine what the facts are. You are likewise the sole judges of the credibility of the witnesses. In determining their credibility you will consider the demeanor of the witness upon the witness-stand, his interest or lack of interest in the result of the trial, and the reasonableness or unreasonableness of his story, and from all these determine where you believe that the credence in this case is and where the truth as to any fact lies.

It will require your entire number to agree upon a [144] verdict. When you have agreed upon a verdict, you will cause it to be signed by your foreman, whom you will elect upon retiring to your jury-room, and return with it into court.

I have in this verdict had recorded "not guilty" as to Count 2. You will not concern yourselves as to that count in your deliberations. You will have to find both defendants guilty on Count 1 if you find any of them guilty, because one man cannot conspire and there is no testimony with relation to anybody else.

The indictment is not any evidence. That is

merely a paper charge which sets out what the charges are before you. You may retire.

The COURT.—Do you agree that a sealed verdict be entered?

Mr. DORE.—I think so. I have no desire to hang around here all night.

The COURT.—To-morrow is a holiday and there won't be any court. We will remain here until six o'clock. If the jury doesn't agree upon a verdict by six o'clock, it is agreed by both sides that the jury may return a sealed verdict at ten o'clock next Thursday morning.

The foregoing contains the whole of the Court's instructions to the jury.

At the close of the evidence, and before any argument was made to the jury, the defendants presented to the Court in writing certain requested instructions, among which were the following:

“If you should, however, be satisfied as to the existence of such conspiracy, you must then consider whether or not the overt act charged in said First Count of said indictment has been proved beyond reasonable doubt. Such overt act must be proved as laid in this indictment, that is, that on or about the 4th day of October, 1922, the said defendants Joseph Fredericks and Clarence Chambers, and each of them, from a foreign country, to wit, British Columbia, in the Dominion of Canada, did wilfully, knowingly and unlawfully carry and transport [145] in and on said gas boat known as the ‘Dragon’ to a place near Stanwood, Washing-

ton, the intoxicating liquors described in said indictment for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the National Prohibition Act. And unless such overt act is proven as it is charged in the indictment and as I have stated it to you, the crime charged cannot be found by you to have been proved and you must return a verdict of not guilty as to each of the defendants on said Count I."

"I instruct you that if you should find from the evidence in this case, that the defendants received this liquor on board the gas boat 'Dragon' near Deception Pass, in the State of Washington, knowing it to be liquor, they would be guilty of a violation of the law, yet you could not convict either one of these defendants upon either the first or second counts in this indictment, because to convict the defendants on the said counts, you must find beyond a reasonable doubt that they brought the liquor into the United States from British Columbia."

"Even though the evidence should convince you that each of the defendants acts illegally and maliciously, still unless you are further convinced beyond all reasonable doubt that such acts were done pursuant to a mutual agreement and understanding, you must return a verdict of not guilty as to each of the defendants on Count I."

Whereupon at 3:38 o'clock P. M. on the 21st day of February, 1923, the jury retired to deliberate upon its verdict.

Thereafter at 12 o'clock P. M. on the same day, the jury reached a verdict and sealed it and the next day being a holiday, on the morning of the 23d day of February, 1923, the said jury returned into court and rendered their verdict finding the defendants Joseph Fredericks and Clarence Chambers guilty on Counts I, III and IV and not guilty on Count II.

Thereafter each of the said defendants severally filed their written motions now on file herein praying that the verdict of the jury be set aside and a new trial granted and also in arrest of judgment.

Thereafter on the 12th day of March, 1923, the said motions and each of them came on for hearing before the Court and were argued by counsel for the said defendants, and the Court not desiring to hear from the counsel for the Government, at the conclusion of the arguments of counsel for the defendants orally [146] rendered the following opinion:

In the United States District Court, Western District, Northern Division, State of Washington.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS et al.,

Defendants.

**Decision on Motion for New Trial and Motion for
Arrest of Judgment.**

The COURT.—As to this indictment, of course, this is not such an indictment as you would draw, Mr. McDonald, or, Mr. Emory, perhaps. But, we do not read this overt act the same. You interpolate something,—must interpolate something into this language which is not there, at the opening of the statement with relation to overt acts. Now, it starts in and says: “and in order to effect the object of said conspiracy, the said conspirators,” so-and-so, “and each of them, to wit,”—that is simply a recitation. That is a part of the thing that they were going to do; conspiring to bring it in from there, but, it has no connection with any overt act yet. Then, here it commences: “On the 4th day of October, 1922, did wilfully and unlawfully carry and transport in a certain gas boat known as the ‘Dragon’ to a place near Stanwood.” It doesn’t say, “from British Columbia.” It just commences with the word “on” there. That is where the overt act commences. The other is simply a statement with relation to the conspiracy; but, the overt act commences from “transport in a gas boat 2628 bottles containing whiskey.” So, that is the overt act, and that was what the testimony was, and that is what the Court told the jury. Now then, in defining [147] to the jury the general term of conspiracy, so that the jury might be advised, the Court, perhaps, used more

language than was necessary, in order to impress upon them what conspiracy was, and when the conspiracy really was a crime. Then, as you read there, the Court did say, "Now the *overt* act charged in this indictment is this":

Mr. McDONALD.—Your Honor used the word "acts."

The COURT.—That is what you read there—defined the overt act and then stated exactly what it was, and then, they must find that. If they do not find that, of course, no offense is committed. And, with relation to the conspiracy, I think that the definition given by the Court of the term "conspiracy," while it might have been stated in less language and more concisely stated, and some language was employed that might as well have been eliminated; yet, I do not think that the language employed in any way affected or could affect any conclusion to be arrived at upon the issue which is submitted.

None of the cases which have been cited have any relation to the issues here; are not conclusive, and do not throw any light upon this, and this is in harmony with all of the decisions as I understand them. Take the Ault case: There the issue was fully stated in the indictment, and there was not any conspiracy there to do a thing, because, in what already had been set out, even the proof would not have added anything to it, even with all the facts set out by the Court, and the indictment wasn't good; and, I think the holding in that case was right.

Now, with relation to the objections urged,—error urged as to the Court in regard to the impaneling of the jury: now, I think that there is no possible error that could be predicated upon anything that was said or done. The object in impaneling the jury is to ascertain the condition of the minds of [148] the jury with relation to the particular issue to be presented as to any preconceived notions with relation to the issue, any prejudices, or anything with relation to that. It is not to place before the jury a hypothetical question and then ask the jurors what they would do if such a condition were established either one way or the other. That is not the idea. It is not to place the jurors on trial and see what the jurors would do in the effect a certain condition were established; but, what is the condition of the minds of the jurors at the instant with relation to the issue, as to any opinions, preconceived notions, or prejudices; and, that is the only purpose of the inquiry of the jurors; and, as to the general questions to be propounded to all of the jurors, when they have application to all of the jurors, it can be done just as well in one question as in twelve. It always seems to me a farce to ask one juror a question and then go to work and ask the next one the same question, and the next one the same, and continue for twelve jurors, when the same one question could be asked at the same time of all of the jurors. These jurors are intelligent men, and they would respond to one question propounded to all just as readily as to

individual inquiries to individual jurors upon the same general questions.

The motion for the new trial will be denied, and that will be the order, and, exception may be noted.

Mr. McDONALD.—Yes, note an exception. Your Honor, I don't want to argue with the Court; but, your Honor's opinion here suggested an angle to this that is new to me.

The COURT.—How is that?

Mr. McDONALD.—I say, your Honor, in your decision has indicated a view that I had not had before. I did not understand, really, your Honor's position before. But, would your Honor permit me one question, and that is, as I understand, your Honor holds your [149] language there indicated relates to the object of the conspiracy? Now, it seems to me, on either horn of the dilemma, if your Honor please, that there is a failure to prove that there was any conspiracy to import liquor.

The COURT.—Oh, no, simply a recitation referring to the other part of the indictment. I understand your position fully, and I think that the matter was fairly submitted to the jury, and an exception will be noted.

Mr. McDONALD.—Yes. I didn't want to quarrel with the Court; but I just wondered if your Honor had thought of that.

The COURT.—Oh, yes.

Mr. McDONALD.—And, there is a motion for arrest of judgment.

The COURT.—I presume that is upon the same grounds practically?

Mr. McDONALD.—Yes.

The COURT.—Then, the motion for arrest of judgment will be denied; exception allowed. . . . The case will be put over one week to sue out a writ of error, and judgment and sentence pronounced at that time.

And, now in furtherance of justice, and that right may be done, and, inasmuch as the foregoing facts do not appear fully of record, the said defendants Joseph Fredericks and Clarence Chambers, tender and present to the Court the foregoing as their bill of exceptions in the above-entitled cause, and pray that the same may be settled and allowed and signed and sealed by the Court and made a part of the record in this case by separate order and document.

CARKEEK, McDONALD, HARRIS &
CORYELL,

JOHN F. DORE,

Attorneys for Defendants. [150]

Service of copy hereof hereby acknowledged this 22d day of March, 1923.

DE WOLFE EMORY,

Special Assistant United States Attorney.

[Indorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Mar. 22, 1923, and Filed April 12, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [151]

United States District Court, Western District of
Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WATSON
and CLARENCE CHAMBERS,

Defendants.

Order Settling Bill of Exceptions.

Now, on this 12th day of April, 1923, the defendants Joseph Fredericks and Clarence Chambers having tendered and presented the foregoing as their bill of exceptions in this cause to the action of the Court, and in furtherance of justice and that right may be done them, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court and made a part of the record herein; and the Court having considered said bill of exceptions and no objections or proposed amendments thereto are offered or proposed by the Government, and being now fully advised, does now in furtherance of justice and that right may be done the defendants, SIGN, SEAL, SETTLE and ALLOW said bill of exceptions as the true bill of exceptions in this cause, and does ORDER that the same be made a part of the record herein.

The Court further certifies that each and all of the exceptions taken by defendants, as shown in

said bill of exceptions, were at the time the same were taken allowed by the Court.

The Court further certifies that said bill of exceptions contains all the material facts, matters, things, evidence [152] and exceptions thereto material to each and every assignment of error made by the defendants and tendered and filed in court in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions was filed and presented to the Court within the time provided by law as extended by the orders of the Court heretofore made herein.

The Court further certifies that the instructions set forth in said bill of exceptions were given by the Court over the objection of the defendants noted in this bill of exceptions and that no other instruction was given by the Court upon the subject matter contained in said instructions, and that the said bill of exceptions contains all exceptions taken by the said defendants to said instructions and the said portions thereof.

IT IS FURTHER ORDERED that the clerk of this Court transmit this said bill of exceptions to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Done and ordered in open court, counsel for the Government and defendants being now present, this 12th day of April, 1923.

JEREMIAH NETERER,
United States District Judge.

[Indorsed] Filed in the United States District Court, Western District of Washington, Northern

Division. Apr. 12, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [153]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 7153.

JOSEPH FREDERICKS and CLARENCE CHAM-
BERS,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to and Including May 19,
1923, to File Record and Docket Cause.**

Now, upon this 10th day of April, 1923, comes on to be heard the motion of the defendants, for an order extending the time to file the transcript of the record herein, the said defendants appearing through their counsel, and the United States of America appearing through its counsel and consenting to such order, and for good cause now shown,

IT IS THEREFORE HEREBY ORDERED,
That the time heretofore allowed in which to file the transcript of the record herein in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is extended for thirty days from the 19th day of April, 1923, or to and including the 19th day of May, 1923.

Done in open court this 10th day of April, 1923.

EDWARD E. CUSHMAN,
U. S. District Judge.

We consent to the entry of the above order.

THOS. P. REVELLE,
DE WOLFE EMORY,

Attorneys for Defendant in Error.

Received a copy of the within order this 10th
day of April, 1923.

THOS. P. REVELLE,
U. S. Atty.,
Attorney for Plaintiff.
F. M. S. [154]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 7153.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,
Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record
on appeal to the Circuit Court of Appeals of the
Ninth Circuit in the above-entitled cause, and
include therein the following:

1. Indictment.
2. Arraignment of defendants.
3. Motion to quash and for return of property.

4. Demurrer.
5. Pleas of defendants.
6. Record of trial and impanelling jury.
7. Verdict.
8. Motion for new trial.
9. Motion in arrest of judgment.
10. Judgment and sentence.
11. Petition for writ of error.
15. Order allowing writ of error and fixing amount of bonds.
16. Assignment of errors.
17. Appeal and bail bond of each defendant.
18. Bill of exceptions.
19. Order settling bill of exceptions.
20. Writ of error.
21. Citation.
22. Defendants' praecipe.
23. Order extending time to file record.

CARKEEK, McDONALD, HARRIS &
CORYELL,

Attorneys for Defendants. [155]

Service of the above admitted this 12th day of
April, 1923.

DE WOLFE EMORY,

Special Assistant United States Attorney.

We waive the provisions of the act approved
February 13, 1911, and direct that you forward
typewritten transcript to the Circuit Court of
Appeals for printing as provided under Rule 105
of this Court.

CARKEEK, McDONALD, HARRIS &
CORYELL,

Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 12, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [156]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7153.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH FREDERICKS and CLARENCE
CHAMBERS,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 156, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the

record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [157]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 444 folios at 15¢	\$66.60
Certificate of Clerk to transcript of record, 4 folios at 15¢60
Seal to said certificate20

I hereby certify that the above cost for preparing and certifying record, amounting to \$67.40, has been paid to me by attorneys for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 26th day of April, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [158]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 7153.

JOSEPH FREDERICKS and CLARENCE
CHAMBERS,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA, To the Honorable Judge of
the District Court of the United States for the
Western District of Washington, Northern
Division, GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment and sentence, of a
plea which is in the said District Court before the
Honorable Jeremiah Neterer, one of you, between
Joseph Fredericks and Clarence Chambers, the
plaintiffs in error, and the United States of Ameri-
ca, the defendant in error, a manifest error hath
happened to the prejudice and great damage of the
said plaintiffs in error, as by their complaint and
petition herein appears, and we being willing that
error, if any hath been, should be duly corrected

and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California. where said court is sitting, together with this writ, so that you have the same at [159] the said city of San Francisco within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 19th day of March, 1923.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the
Western District of Washington, Northern
Division.

Allowed this 19th day of March, 1923, after plaintiffs in error had filed with the Clerk of this Court with their petition for a writ of error, their assignment of errors.

JEREMIAH NETERER,
Judge of the District Court of the United States
for the Western District of Washington,
Northern Division.

Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [160]

In the United States Circuit Court of Appeals. for
the Ninth Circuit.

No. 7153.

JOSEPH FREDERICKS, *alias* JOSEPH WAT-
SON, and CLARENCE CHAMBERS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA, to the United States of Amer-
ica and to THOMAS P. REVELLE, United
States Attorney for the Western District of
Washington, GREETING:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
at the City of San Francisco, State of California,
within thirty (30) days from the date hereof, pur-
suant to a writ of error filed in the Clerk's office

of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Joseph Fredericks and Clarence Chambers are plaintiffs in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. [161]

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 19th day of March, A. D. 1923.

[Seal]

JEREMIAH NETERER,

Judge.

Service of the within and above citation and receipt of a copy thereof is hereby admitted this 19th day of March, A. D. 1923.

DE WOLFE EMORY,

Special Assistant United States Attorney.

Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [162]

[Endorsed]: No. 4023. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Fredericks and Clarence Chambers, Plaintiffs in

Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received April 30, 1923.

F. D. MONCKTON,
Clerk.

Filed May 7, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 4023

JOSEPH FREDERICKS and CLARENCE
CHAMBERS, *Plaintiffs in Error*

vs.

UNITED STATES OF AMERICA,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORHERN DIVISION
HONORABLE JEREMIAH NETERER, JUDGE

BRIEF OF PLAINTIFFS IN ERROR

CARKEEK, McDONALD, HARRIS & CORYELL

ATTORNEYS FOR PLAINTIFFS IN ERROR

1164 EMPIRE BUILDING, SEATTLE, WASHINGTON

FILED
JUN 23 1923

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4023

JOSEPH FREDERICKS and CLARENCE
CHAMBERS, *Plaintiffs in Error*

vs.

UNITED STATES OF AMERICA,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORHERN DIVISION
HONORABLE JEREMIAH NETERER, JUDGE

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

The plaintiffs in error, Joseph Fredericks and Clarence Chambers, were indicted on four counts. The first count charging a conspiracy between themselves and other persons to the grand jurors unknown, to violate the act of October 28, 1919, and

the purpose of the conspiracy was alleged to be the importing, possessing and transporting of intoxicating liquors. But one overt act was alleged and that was that the plaintiffs in error, "from a foreign country, to-wit, British Columbia, in the Dominion of Canada, on or about the 4th day of October, 1922, did wilfully, knowingly and unlawfully carry, and transport in and on a certain gas boat known as the 'Dragon,' to a place near Stanwood, Washington, certain intoxicating liquors." The second count alleged the importation of the same intoxicants on the same day, from the same foreign country. The third count charged the possession of the same intoxicants on the same day, and the fourth, the transportation of the same intoxicants on the same day in the same boat. (Trans. p. 2.)

A motion to quash the indictment and for a return of the evidence (Trans. p. 9) and also a demurrer (Trans. p. 13) having been overruled, the defendants pleaded not guilty (Trans. p. 16) and were placed on trial. (Trans. p. 17.) At the conclusion of the trial, the jury returned a verdict of guilty as charged on Counts I, III and IV of the indictment as to the plaintiffs in error (Trans. p. 20), and after a motion for a new trial and motion

in arrest of judgment had been duly interposed and denied (Trans. p. 177), plaintiffs in error were each sentenced to serve a term of eighteen months in the federal penitentiary at McNeil's Island on the first count and to pay a fine of Fifty Dollars (\$50.00) each on each of the other two counts. (Trans. pp. 34, 35.)

Whereupon application was made for a writ of error to review the judgment of the District Court, which having been granted, the case was brought to this court.

The indictment was filed October 26, 1922. Against this indictment, on the first day of November, 1922, the plaintiffs in error, after demand for return of the liquor seized, filed a motion for the suppression of the evidence obtained, as seized in violation of their constitutional rights. (Trans. pp. 9-12.)

This motion was heard on affidavits. The evidence of the plaintiffs in error tended to show that on the evening of October 4, 1922, at about 6:15 in the evening while they were on board of the gas boat "Dragon," going up the south channel of the Stillaguamish River, near Stanwood, Washington, five men suddenly rose up from behind a dike and

leveled rifles and sawed-off shotguns at them, crying out: "We know who you are. Stop or we'll kill you." That the plaintiffs in error, not knowing who the men were, but believing them to be hold-up men, stopped the boat and Chambers, who was in the pilot house, stepped back into the cabin, whereupon the men on the bank fired a volley into the boat, striking Chambers in the leg and seriously wounding him. That among other things on the boat, there was a quantity of whiskey and gin contained in gunny sacks in the cabin of the boat, the cargo of the boat being entirely concealed by the cabin, and curtains on the windows. That after shooting Chambers, the men on the bank, who later proved to be prohibition agents, came upon the boat and without exhibiting or stating that they had any search warrant, proceeded to search the boat and on discovering the liquor, placed the plaintiffs in error under arrest and seized the boat. (Trans. pp. 60-69.) In addition to their own affidavits, the plaintiffs in error submitted the affidavits of George G. Myron, Martin N. Leque and Eric Sederstrom, three farmers who were working in a near-by field, whose affidavits substantiated the version of the plaintiffs in error. (Trans. pp. 98, 101, 102.) The government filed affidavits of the agents, who

took part in the arrest, to the effect that they had information that this boat was used for transporting liquor and that an agent by the name of Regan had on the 27th day of September procured a search warrant. No copy of the search warrant was ever produced in court but the application and affidavit therefor was produced, which was as follows:

“United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT

L. Regan, being first duly sworn, on his oath deposes and says: That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress has been and is being committed in this, that, in the City of Stanwood, County of Snohomish, State of Washington, and within the said District and Division above named, one John Doe Foster, on one gas screw-boat named “Dragon” on the 27th day of September, 1922, and thereafter was, has been and is possessing, transporting intoxicating liquor, all for beverage purposes, on premises described as —, and on the premises, used, operated and

occupied in connection therewith, all being in the County of Snohomish, State of Washington, and in said District, and all of said premises being occupied or under the control of John Doe Foster, all in violation of the statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, this said affiant hereby asks that a search-warrant be issued directed to the United States Marshal for the said district and his deputies, and to any National Prohibition Officer or Agent or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said gas screw-boat named "Dragon," and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor *and* means of committing the crime aforesaid all as provided by law and said Act.

(Signed) L. REGAN.

Subscribed and sworn to before me this 27th day of September, 1922.

[Seal] (Signed) R. W. McCLELLAND.
United States Commissioner, ——— District of
Washington." (Trans. pp. 66, 89.)

No evidence was presented as to what the information was upon which the prohibition officers applied for the search-warrant.

The evidence of the government tended to show that the agents had lain in wait for this boat some days near Stanwood, Washington, and their affidavits contradicted the affidavits filed by the plaintiffs in error in that they claimed that the curtains were not down on the windows and that when the boat got within twenty or thirty feet of them, they could see piled up in the boat, sacks with the form of bottles discernable through the burlap, which from their experience as prohibition agents, they knew were similar to sacks in which bottles of liquor were transported.

Agent Linville who was in charge of the party of agents making the search and seizure, testified at the preliminary hearing that he did not exhibit or mention the search warrant to the plaintiffs in error but left it in the boat after their arrest and after they had left the boat. (Trans. pp. 74, 75 76.) This statement was later contradicted by affidavits filed before the hearing, on the motion to suppress in which it was claimed by agents Linville and Justi, that agent Linville at the time of

the arrest approached the boat with a pistol in one hand and the search-warrant in the other. The government also filed affidavits by certain residents of Stanwood as to the conditions on the boat some hours after the arrest while it was at the dock at Stanwood, that the curtains on some of the windows at that time were up.

In addition to the affidavits, the plaintiffs in error filed a certified transcript of the testimony of Agent Linville given at the preliminary hearing before the United States Commissioner a few days after the arrest. (Trans. p. 70.)

The motion was submitted on the foregoing record, after argument, to the trial judge, who took the same under advisement, who thereafter filed an opinion in which he held that it was not necessary to discuss the sufficiency of the basis for the issuing of the search-warrant or the legality of its execution, but held that the fact that the agents saw the gunny sacks showing the form of bottles therein warranted them in arresting the defendants. (Trans. p. 113.)

The plaintiffs in error then demurred to the indictment among other things on the grounds of improper joinder and that the same was duplicitous

and uncertain. (Trans. p. 13.) The trial court overruled this demurrer. (Trans. p. 117.)

In impanelling the jury, counsel for plaintiffs in error were required to ask their general questions as to the qualifications of the jurors to the jury en masse and not to repeat the same to each individual juror. To this action of the court, the plaintiffs in error excepted and their exception was allowed. (Trans. p. 120.) The trial court also refused them the right to ask the jurors if they would vote for no verdict except that which each thought to be right. (Trans. p. 119.)

The evidence of the government at the trial tended to establish that certain agents of the government had gone to Stanwood the latter part of September, 1922, with a view to investigating the reported illicit use of the gas boat "Dragon" in transporting liquor; that on the afternoon of Sunday, October 1st, they had seen the boat leave Stanwood, going out the north fork of the Stillaguamish River. At about noon, on the 4th of October, they saw it again, anchored in mud bay at the mouth of the south fork of the river and watched it until it left in the afternoon and started up the south fork, where the boat was stopped, the plaintiffs in error

arrested and liquor on board seized under the circumstances heretofore detailed.

In addition to the testimony of the agents as to the arrest, a resident near the scene of the seizure testified to having seen the defendant Chambers on the boat "Dragon" in the month of September (Trans. p. 137), and another resident testified to having seen both of the defendants on the boat during the month of September. (Trans. p. 138.) A. W. Johnson, a clerk in the federal prohibition office, testified that about noon on the day following the arrest, he heard a conversation between defendant Chambers and federal prohibition agent Regan at the hospital to which the defendant Chambers was taken. He testified that Chambers first stated that he had an interest with Fredericks in the boat but later stated that he was employed as an engineer on the boat, and that the liquor was gotten from Pender Island in Canadian waters. (Trans. p. 140.) This alleged admission was claimed to have been made when the defendant Fredericks was not present. Leonard Regan, a prohibition agent, was also a witness and testified to substantially the same state of facts as Johnson. (Trans. p. 141.)

There was no testimony on the part of any of the witnesses for the government (outside of the purported confession of Chambers that the liquor was secured on Pender Island) that the liquor found on the "Dragon" had been brought from Canada as alleged in the only overt act in the conspiracy count of the indictment.

At the conclusion of the government's case, the defendants moved for a directed verdict of not guilty under the conspiracy count, upon the ground that no competent evidence had been introduced, which tended to establish the overt act laid in the indictment. The defendant Fredericks further moved for a directed verdict of not guilty under the conspiracy count on the ground that if the court should hold that the statement made by Chambers as to the liquor being brought from British Columbia was competent to establish the overt act, as against Chambers, it could not establish the overt act as against Fredericks, said statement being made in the absence of Fredericks and after the termination of the alleged conspiracy. Both of the defendants also moved for a directed verdict in their own behalf upon Count II of the indictment wherein they are charged with importing liquor from British Columbia upon the ground that without other evi-

dence of the corpus delicti, i. e., the importation other than the finding of the liquor, the alleged confession of Chambers was insufficient to bind him and could in no event bind Fredericks because made in his absence. Defendant Fredericks also moved separately for a directed verdict in his behalf upon Count II of the indictment wherein he was charged with importing liquor from a foreign country upon the ground that the evidence was not sufficient to bind him and there was a total failure of proof thereof. These motions were denied, with leave to raise them again at the conclusion of all the testimony. (Trans. pp. 144, 145.) The defendants then offered testimony in their own behalf.

Joseph Fredericks testified that he was thirty-nine years of age, was a farmer and had an interest with Chambers in Lummi Bay Packing Company. That they jointly owned the launch "Dragon" and used it to go back and forth to the cannery of the company. That the "Dragon" was old and leaky, having been built in 1906 and could not withstand rough water and was only capable of making seven miles an hour. That the duck hunting season opened on October 1, 1922, and he and Chambers had planned to go duck hunting in the "Dragon" that day. That they left Stanwood about

noon on October the first. That they went to the mouth of the north fork of the Skagit River, intending to go through the Swinomish slough. The tide being low, they had to wait until about eleven o'clock that night. While at the north end of the slough, they borrowed a boat from a fisherman, which they tied behind the launch. About midnight they went through the slough and on to a place known as Joe Leary's slough, arriving there about two o'clock in the morning.

They slept on the boat and got up about 7:30 next morning to go duck hunting, when they noticed that their rowboat was gone. They then decided to go back and see if they could find the rowboat. On the way back, they developed trouble with their magneto and were delayed till evening, so they stayed that night at La Conner. They called up a friend by the name of Tjesland, who had a farm near La Conner and asked him to come in and take them in his automobile to La Conner to get a magneto they had at the Palace Hotel there. This Tjesland did. They got the magneto from Cort, the proprietor of the hotel and also borrowed a rifle from him. Leaving Stanwood about midnight, they arrived back at La Conner about one o'clock on the morning of the 3rd of October. About six

o'clock that morning, they got up and went out to Heblloom's fish trap near Skagit Island, where they borrowed a rowboat from a Harry Rock, who was in charge of the trap. They hunted on the bay all day and returned with some ducks they had shot, to the fish trap, where they had supper with Rock on board the "Dragon." Rock stayed with them till about eleven o'clock that night, when Rock went back to his fish traps and the defendants went to sleep on their launch. About half past three next morning, Fredericks was awakened by a man calling and got up to see who it was. The stranger told him that his launch had broken down and asked if he could help him out by taking his cargo to Stanwood. Fredericks agreed to do so. Chambers was asleep in the engine room at the time. After the boat was loaded, the owner got on board and Fredericks started the boat for Stanwood. On the way in they passed the boat "Lily" at the north ford of the Stillaguamish River, the man who owned the cargo got off on the bridge and promised to meet the launch at the dock at Stanwood. On the way up the river, the magneto developed trouble again and while attempting to fix it, the boat drifted out of the south channel, into Mud Bay, where it became lodged on the tide flats and it was six hours before they could get off, at about four

o'clock in the afternoon. On the way up the river, Fredericks was in the back of the boat cooking supper, when he heard hollering and shouting, which he first thought was being done by hunters but later found to be prohibition agents. (Trans. pp. 145-150.)

Chambers testified that he was thirty-one years old, born in La Conner and lived there all his life, except for two years spent as a volunteer in the United States army, during the World War, where he served in the airplane service and was injured therein. He was a farmer. He corroborated the story of Chambers as to their whereabouts from the time they left Stanwood on October 1st to go duck hunting, till their arrest on the 4th. He testified he did not wake up till seven o'clock on the morning of the 4th and knew nothing of the cargo being put on board till the boat was aground in Mud Bay. He denied that he made any statement to Regan and that he did not know where Pender Island was and had never been there. (Trans. pp. 151, 152 and 153.)

Jess Hall, a resident of Stanwood, testified to having seen the defendants in Stanwood at eleven o'clock on the night of October 2nd (Trans. p. 154) as did also Albert Cort, proprietor of the Palace

Hotel. (Trans. p. 154.) Frank Jackson, bridge tender of the Great Northern bridge at the north end of the Swinomish slough testified to seeing the defendants there and that the boat was empty. (Trans. p. 155.) Oscar Tjesland, testified that he was on board the "Dragon" on the night of October 2, 1922, at La Conner and that the boat was empty. (Trans. p. 156.)

Harry Rock, fish-trap foreman, testified to seeing the defendants on October the 3rd at Skagit Bay and to being on the "Dragon" till about eleven o'clock that night, at which time it was empty. (Trans. p. 157.) Captain Henry Whalen of the tugboat "Lily" testified to passing the "Dragon" in the north channel of the Stillaguamish River at six o'clock on the morning of October 4th. (Trans. p. 157.) Samuel Chambers, father of the defendant Clarence Chambers, testified to being present at the hospital when Regan and Johnson were present and denied that his son made any statement that he got the liquor at Pender Island and said that he did no more in the presence of the officers than groan from the pain of his wounded leg. (Trans. p. 158.)

The defendants each severally moved that a verdict of not guilty be returned as to him, or in the al-

ternative that Count I be taken from the jury and a verdict of not guilty be directed, on the ground that there was no evidence to establish the only overt act alleged, the importation from Canada, except the alleged statement of Chambers, which was not sufficient as to Chambers on the ground that the *corpus delicti* can not be proved solely and exclusively by a confession and as to Fredericks for the additional reason that the statement of his co-defendant Chambers after his arrest and in his absence could not be considered as against him. As to Count II each defendant severally moved in the alternative that the court direct a verdict of not guilty, Fredericks for the reason that there was no testimony that connected him with any importation, except the statement made by his co-defendant after his arrest and in his absence, and Chambers for the reason that the *corpus delicti* can not be proved solely and exclusively by a confession. And if the foregoing motions were denied, the defendants moved that the government be required to elect between the conspiracy and the other three counts in the indictment.

Thereupon the court orally ruled as follows:

“THE COURT: I think the motion should be sustained as to Count Two as to each defendant. There is aside from the statement alleged to have been made by the defendant Chambers [133] no testi-

mony before the court that this was imported, and the statement of Chambers can not bind Mr. Fredericks upon the importation; and there is nothing establishing the *corpus delicti* aside from the statement. As I understand the law, there must be some evidence of some kind to establish the *corpus delicti* before the confession could be applied.

“MR. DORE: Would it be proper to ask your Honor what you consider the evidence is as to Count One, so we can make our argument conform?”

“THE COURT: Oh, yes, there is testimony as to Count One. The motion is denied as to Count One, the conspiracy charge. Of course, we all understand that at common law a conspiracy or crime was complete upon the act of conspiracy being entered into without any other act; but under the act of Congress,—section 37,—some overt act is necessary to carry into effect or carry forward the conspiracy before it is an offense. Now, that overt act may be any act the most minor. Proof of any sort of an act on the part of a person,—a word would be sufficient, a writing, a movement of any kind. I would say here that while this indictment charges the conspiracy was entered into on the fourth of October, the government is not bound by that date. The conspiracy may have been entered into any time within the period of limitations of three years. There is testimony here as to the activity of the defendants with relation to this vessel prior to this time in the month of September, and likewise in the month of October. The overt acts charged here are that ‘After the formation of the conspiracy, said conspirators,’ naming them,—‘on

or about the 4th day of October did knowingly, unlawfully, carry and transport in [134] and on a certain gas boat known as the "Dragon" to a place in Stanwood.' The charge is that they lived in Stanwood, that the conspiracy was entered into at Stanwood, *and they moved down the river*. Any sort of a movement effectually would be sufficient. So that there is ample testimony here with relation to the overt act, if a conspiracy was entered into, for the purpose of effecting the offense. That is a matter for the jury to determine.

"MR. DORE: We may have an exception, of course.

"MR. McDONALD: Your Honor holds that the law to be that the overt act need not be proved as laid?

"THE COURT: Oh, no." (Trans. pp. 159-161.)

There was no evidence to prove the only overt act alleged in the conspiracy count, to-wit, the importation of the liquor from Canada. Upon proof of the foregoing facts, the case was sent to the jury and a verdict of guilty returned against the plaintiffs in error on Counts I, III and IV.

The questions in the case are:

1. Was there a violation of the constitutional rights of the plaintiffs in error in the search and seizure of their boat?

2. Was the indictment sufficient?

3. Did the court err in restricting the counsel for plaintiffs in error on their *voir dire* examination of the jury?

4. Was the evidence offered in the case sufficient to warrant submitting the conspiracy count to the jury?

5. Did the court err in the admission and rejection of testimony?

6. Was the jury properly instructed?



ASSIGNMENT OF ERRORS

(Tr. pp. 41-53 incl.)

Come now the above-named defendants, Joseph Fredericks and Clarence Chambers, and in connection with their petition for writ of error in this cause submitted and filed herewith, assign the following errors which the defendants aver and say occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which they rely to reverse, set aside and correct the said judgment and sentence entered herein, and say that there is manifest error appear-

ing upon the face of the record, and in the proceedings in this:

I

The District Court erred in overruling the motion of defendants to quash the indictment and for the return and suppression of the evidence of the liquor seized at the time of the defendants' arrest, which motion was made prior to the trial and from the showing made thereon it clearly appeared that the search and seizure was made without the proper issuance or execution of any search warrant or pursuant to any lawful arrest of the defendants and was in violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States. Due and timely exception was taken to the action of the trial court in overruling defendants' motion to quash and for the return and [36] suppression of the evidence.

II

The District Court erred in overruling the demurrer to the indictment on the ground that the four counts are improperly joined therein and it is duplicitous and the several counts are not for the same act or transaction nor are they connected to-

gether nor are they of the same class of crimes or offenses.

III

The District Court erred in overruling the demurrer to Count I of the indictment, in this that it does not charge that the defendants were to possess the said liquor for the purpose of sale, barter or exchange, or if they were not to do it by what persons the said acts were to be done and was, therefore, defective for uncertainty.

IV

The District Court erred in overruling defendants' motion for an inspection of the liquor and the right to take samples for analysis prior to the trial.

V

The District Court erred in overruling defendants' motion for a bill of particulars requiring the government to set out a description of the labels and other letters on said liquor.

VI

The District Court erred in overruling the motion of the defendants to require the government to elect

between Count I and Counts II, III and IV as to which the defendants should be tried upon, which motion was made immediately after the case was called for trial and before the introduction of any evidence, upon the ground that Count I charged the defendants together with others as having committed the crime charged in said Count I, [37] whereas the defendants alone are charged with having committed offenses in Counts II, III and IV. Due and timely exception was taken to the action of the trial court in overruling the defendants' motion to elect.

VII

The District Court erred in refusing the defendants' counsel the right to ask the jurors if each of them would vote for only such verdict as to him should seem right irrespective of what the other jurors might think except as the other jurors might influence him by legitimate argument. A juror, Lee J. Priest, being in the box, he was asked by Mr. McDonald this question:

"Q. If you were accepted on the jury, Mr. Priest, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jurymen did—

“THE COURT: The question is not fair. Need not answer.

“Q. —except as they might influence you by legitimate argument? The fact that seven or eight or even more of the other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?

“THE COURT: That is not a fair question. What we want to find out is whether the jury knows anything about this case, whether they are prejudiced, whether they have any preconceived notions about it; not what they would do under or upon a certain state of facts.

“MR. McDONALD: I understand that on the *voir dire* counsel has a right to ask questions—

“THE COURT: No. Proceed. We will not permit any questions upon what jurors will do in the future upon any state of facts being established. [38]

“MR. McDONALD: Exception.

VIII

The District Court erred in overruling defendants' motion for a return and suppression of the liquors seized at the time of defendants' arrest, when it was renewed at the opening of the government's case and to which due and timely exception was taken.

IX

The District Court erred in admitting in evidence over the objection and exception of the defendants, the bottles of liquor as government's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason that said liquor was seized in violation of defendants' constitutional rights.

X

The District Court erred in permitting witness William Griffith to testify that he found two high-power rifles and two mauser pistols with convertible stocks on the launch of the defendants at the time of their arrest and in overruling defendants' objection thereto.

XI

The District Court erred in overruling and in not granting the motions of the defendants for a directed verdict finding them not guilty on Count I, made at the close of the evidence introduced by the government in support of the indictment, which motion was based upon the following several grounds:

(a) Insufficiency of the evidence to establish the overt act in said Count I.

(b) Insufficiency of the evidence to establish any conspiracy.

(c) Insufficiency of the evidence to establish the overt act charged as against the defendant Fredericks. [39]

XII

The District Court erred in overruling the motions of the defendants for a directed verdict of acquittal on Count I made at the close of the entire case and before it was submitted to the jury, which motion was based upon the following grounds:

(a) Insufficiency of the evidence to establish the overt act charged in said Count I.

(b) Insufficiency of the evidence to establish any conspiracy.

(c) Insufficiency of the evidence to establish the overt act charged as against the defendant Fredericks.

XIII

The District Court erred in refusing defendants' counsel the right to again go into the facts on the trial as to the manner of the arrest of the defend-

ants and the search and seizure of their launch, which refusal was duly excepted to.

XIV

The District Court erred in overruling and in denying the motion of the defendants that the government be ruled to elect whether it would proceed on Count III or Count IV, as one covers possession and the other transportation and the one is comprised and comprehended in the other.

XV

The District Court erred in refusing to give the jury the following instruction asked for by the defendants:

“If you should, however, be satisfied as to the existence of such conspiracy, you must then consider whether or not the overt act charged in said first count of said indictment has been proved beyond reasonable doubt. Such overt act must be proved as laid in this indictment, that is, that on or about the 4th day of October, 1922, the said defendants Joseph Fredericks and Clarence Chambers, and each of them, from a foreign country, to-wit, British Columbia, in the Dominion of Canada, did wilfully, knowingly and unlawfully carry and transport in and on said gas boat known as the ‘Dragon’ to a

place near Stanwood, Washington, the intoxicating liquors described in [40] said indictment for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the National Prohibition Act. And unless such overt act is proven as it is charged in the indictment and as I have stated it to you, the crime charged can not be found by you to have been proven and you must return a verdict of not guilty as to each of the defendants on said Count I."

To the refusal to give which instruction the defendants excepted in due time.

XVI

The District Court erred in refusing to give to the jury the following instruction asked for by the defendants:

"I instruct you that if you should find from the evidence in this case that the defendants received this liquor on board the gas boat 'Dragon' near Deception Pass, in the State of Washington, knowing it to be liquor, they would be guilty of a violation of the law, yet you could not convict either one of these defendants upon either the first or second counts in this indictment, because to convict the defendants on the said counts, you must find beyond a reasonable doubt that they brought the liquor into the United States from British Columbia."

To the refusal to give such instructions, the defendants objected and saved their exception in the presence of the jury.

XVII

The District Court erred in refusing to give the jury the following instruction asked for by the defendants:

“Even though the evidence should convince you that each of the defendants acted illegally and maliciously, still unless you are further convinced beyond all reasonable doubt that such acts were done pursuant to a mutual agreement and understanding, you must return a verdict of not guilty as to each of the defendants on Count I.”

To the refusal to give which instruction the defendants objected and saved their exception in the presence of the jury.

XVIII

The District Court erred in giving to the jury that portion of the charge of the court given to the jury, which is as follows: [41]

“In order to establish a conspiracy there must be three things established. One is the conspiring together, the co-operating, the confederating, the

conduct of the parties that so inter-relate into each other as to preclude a conclusion other than that there was a conspiracy and understanding to do the particular thing that is charged. And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the National Prohibition Act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down the stream, or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient that they have proved one act that would carry forward the conspiracy.”

To which instruction the defendants excepted in due time, upon the ground that it permitted the jury to find the defendants guilty of the conspiracy charged without finding the only overt act, to-wit, the importation charged in the indictment to be proved as laid but told the jury they could find the defendants guilty in spite of the fact that the overt act charged was not proved, provided they found the defendants had committed other overt acts not charged in said indictment.

XIX

The District Court erred in giving to the jury that part of the charge of the court given to the jury, which is as follows:

“The court withdrew,—as I stated a moment ago briefly,—Count 2. There is a difference between Count 2, importation, and the conspiracy count. Now, a conspiracy may be completed and effected without bringing in a drop of liquor as charged. Without bringing in any liquor, if the parties entered into a conspiracy to violate the National Prohibition Act, to import liquor from British Columbia, and one of the persons then does anything to effect that object—this is simply for the purpose of illustration—if he writes a letter to carry it forward, or if he runs a boat around the bay, if he does anything,—it is immaterial what it is,—to effect the object of the conspiracy, why then the offense is complete without bringing in any of the liquor. But to import any liquor into the United States, that means to bring it in. They must actually bring the liquor in before they would violate the importation act. But under the conspiracy act, that is not necessary. I merely go a little into that detail because of the argument that was made before you by counsel for the defendants.” [42]

To which instruction the defendants excepted in due time, upon the ground that it permitted the jury to find the defendants guilty of the conspiracy

charged without finding the only overt act, to-wit, the importation charged in the indictment to be proved as laid but told the jury they could find the defendants guilty in spite of the fact that the overt act charged was not proved, provided they found the defendants had committed other overt acts not charged in said indictment.

XX

The District Court erred in giving to the jury that part of the charge of the court given to the jury, which is as follows:

“A conspiracy is sometimes denominated by law writers as a partnership in crime. Now, in a civil partnership, one partner binds the other by his acts and his statements with relation to matters within the partnership business. So in a criminal conspiracy, every person entering into a conspiracy is a partner in this conspiracy, and whatever he does or whatever he says during the continuance of the conspiracy binds the other partner; but after the conspiracy is ended or consummated, then the partnership ceases and a party then can not bind the other party by any statements that he may make or anything that he may do.”

To which instruction the defendants excepted in due time, because it fails to state that before a person enters into a conspiracy or does an act that con-

tributed to effectuate the object of the conspirators can be guilty, he must have knowledge of the existence of the conspiracy, and that the act that helps in the accomplishment of its object is done knowingly and with the intention of bringing about the accomplishment of the conspiracy.

XXI

Thereafter, and within the time limited by law, and the order and rules of the court, the said defendants and each of them moved for a new trial, which said motion was overruled by the court, and an exception allowed the defendants, which [43] ruling of the court, the defendants now assign as error.

XXII

Thereafter, and within the time limited by law, the defendants moved the court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the court and exception was allowed to the defendants, and now the defendants assign as error the overruling of the said motion.

XXIII

The District Court thereafter entered judgment and sentence against said defendants and each of them upon the verdict of guilty rendered upon the said indictment, to which ruling and judgment and sentence the defendants and each of them excepted and now the defendants assign as error that the court so entered judgment and sentence upon the verdict, because said defendants were convicted on proof taken from them in violation of their constitutional rights and further because said Count I did not state a crime and there was in addition no evidence to support the only overt act alleged therein and judgment upon said Count I as entered was without validity in law. And the trial court further erred in imposing sentence upon Counts III and IV for the reason that the two offenses charged in said counts include and comprehend each other, and the judgment as entered imposed two penalties for one offense, i. e., sentence should have been imposed, if at all, upon one or the other of Counts I or II but not upon both.

And as to each and every of said assignments of error as aforesaid, the defendants say that at the time of the making of the order or ruling of the

court complained of, the defendants duly asked and were allowed an exception to the ruling and order of the court. [44]

WHEREFORE, defendants and each of them pray that the judgment of said court be reversed and this cause remanded to the said District Court with directions to dismiss the same and discharge said defendants from custody and exonerate the sureties on his bail bond or in any event to grant defendants a new trial.



FINAL ISSUES

The above errors may be grouped for the purpose of simplifying the argument into six fundamental questions, which, therefore, become the main issues in the case.

Thus: ERRORS I, IX and X rest upon
ISSUE I

Was there such a violation of the constitutional rights of the plaintiffs in error in the search and seizure of their launch, as to require the suppression of the evidence of the commission of the crime gained thereby?

ERRORS II, III, IV and XIV rest upon
ISSUE II

Was the indictment sufficient?

ERROR VII becomes
ISSUE III

Did the plaintiffs in error have the right to interrogate the jurors separately and to ask if each would only vote for such verdict as he himself thought right?

ERROR XIII becomes
ISSUE IV

Did the court err in its ruling refusing plaintiffs in error to again go into the legality of the search and arrest at the trial?

ERRORS XI and XII rest upon
ISSUE V

Was there sufficient evidence upon which to submit the conspiracy count to the jury or was there a fatal variance between the overt act alleged and the proof?

ERRORS XV, XVI, XVII, XVIII, XIX and XX
rest upon

ISSUE VII

Did the court err in instructions given the jury?

ERRORS IV, V and X will not be discussed, and
ERRORS XXI and XXII and XIII are merely general objections.



ARGUMENT

At the threshold of this case we are met with a serious question, involving the constitutional rights of the plaintiffs in error. It has been the universal rule in the United States courts to strictly enforce the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, even though it may result in a given case that guilty men go unwhipped of justice, for it has been held that this fundamental law protects them as well as the innocent. This thought has found eloquent expression in the following cases:

Weeks v. United States, 232 U. S. 383, 34
Sup. Ct. 341, 58 L. Ed. 652.

United States v. Bookbinder, 278 Fed. 216.

United States v. Mitchell, 274 Fed. 128.

United States v. Kelih, 272 Fed. 484.

Atlantic Food Products Corp. v. McClure,
288 Fed. 982.

As a corollary to this, it follows that the success of an unlawful search, does not make the result lawful.

United States v. Slusser, 270 Fed. 818.

State v. One Hudson Automobile, 190 N. Y.
S. 481.

With these principles in mind, we shall proceed to discuss the legality of the search, seizure and arrest of the defendants and the use of the evidence so obtained against them.

ISSUE I

The Honorable District Court erred in overruling the motion of plaintiffs in error to quash the indictment and for return or suppression of the evidence, for

POINT 1

The issuance of the search warrant was void, because

(1) The affidavit did not state facts showing probable cause.

It is, of course, elementary that under the statute (Sec. 3, Title XI, Act of June 15, 1917), an affidavit filed as the basis for the issuance of a search warrant must state facts and not conclusions.

Atlantic Food Products Corp. v. McClure,
288 Fed. 982.

Lipschutz v. Davis, 288 Fed. 974.

U. S. v. Harnich, 289 Fed. 256.

In re Rosenwasser Bros., 254 Fed. 171.

In this case, the prohibition agent boldly swore that "one John Doe Foster, on one gas screw boat named 'Dragon,' on the 27th day of Sepember, 1922, and thereafter was, has been and is possessing, transporting intoxicating liquor, all for beverage purposes." (Trans. p. 65.) That was, of course, a mere conclusion and does not state the facts necessary to establish probable cause.

Giles v. United States, 284 Fed. 208.

United States v. Illig, 288 Fed. 939.

United States v. Yuck Kee, 281 Fed. 228.

(2) It did not sufficiently describe the article to be seized or the premises to be searched.

Section 3, Title XI, Act of June 15, 1917, known as the "Espionage Act," under which the search warrant was issued, provides the affidavit must par-

ticularly describe the property and place to be searched. (1918 Sup. Fed. St. Anno. p. 129.)

While the government did not produce the search warrant and no return was ever made thereon, the warrant could not exceed the affidavit on which it was based, which describes no liquors or premises.

Honeycutt v. United States, 277 Fed. 939.

Lipschutz v. Davis, 288 Fed. 974.

POINT 2

The search warrant was illegally executed, because

(1) No copy was given the plaintiffs in error.

Section 12 of the "Espionage Act" requires a copy of the warrant be given the person from whom property is taken.

Agent Linville, who testified to having the search warrant, testified before the United States Commissioner at the preliminary hearing that he kept it in his pocket all of the time until long after the arrest and left it in the pilot house in the absence of the plaintiffs in error. (Trans. pp. 73-80.) At the trial he testified: "I did not show the search warrant to either of the defendants, I will admit that." (Trans. p. 131.)

His total failure to comply with the statute in the matter of the service of the warrant rendered it void.

United States v. Yuck Kee, 281 Fed. 228.

(2) No receipt for the property taken was given the plaintiffs in error.

It is admitted that no receipt was given to anybody of the property seized. (Trans. p. 78.) This was in violation of section 12 of the Espionage Act and rendered the execution of the warrant void.

United States v. Yuck Kee, 281 Fed. 228.

There was such a total disregard of all the provisions of the law as to search warrants, that the trial judge did not pass on these questions but rested his decision on the ground that the search was made pursuant to a valid arrest, which we shall now discuss.

POINT 3

The search and seizure was not made pursuant to any valid arrest of the plaintiffs in error for an offense committed in the presence of the officers, for

(1) The evidence preponderated to establish that the liquor was inside the cabin of the launch hidden from view of the government agents.

The hearing on the motion to suppress was had on affidavits and this court is in as good a position to pass on the question of fact as to whether the sacks in which the liquor was contained could be seen, as was the trial court. It is admitted that the liquor was in the cabin of the launch "Dragon." The only dispute was as to whether the blinds were drawn or not. The defendants deposed that they were—and were corroborated in this by the three bystanders who witnessed the arrest. The agents deposed that on some of the windows the curtains were apart and they could see the forms of bottles in burlap sacks through those windows. It seems to us that the court would consider the extreme improbability that men engaged in the clandestine running of liquor, would carry their cargo exposed to view. The defendants are also corroborated by the testimony of agent Linville (the agent in charge of the raiding party), who testified before the commissioner on cross-examination, a few days after the arrest, "*after boarding the boat and finding it was loaded with liquor, I didn't pay any attention to the search warrant then, until we tied up. I left the search warrant in the boat.*" (Trans. p. 73.) This statement made voluntarily before the controversy as to the validity of the search was raised and be-

fore there was the motive in the agents' minds to color their testimony, should, it seems to us, convince this court that the agents had nothing but suspicion as to what was in the boat prior to their high handed action in shooting one of the defendants and searching the boat afterward, and it was not until then that they knew or, as far as appears from the record, had any reasonable ground for believing that the defendants were violating any law.

In the case of a misdemeanor, an officer has no right to arrest without a warrant unless he has direct personal knowledge that the crime has been committed. This was held by the Supreme Court of the United States in the case of *Kurtz v. Moffitt*, 115 U. S. 487, 29 Law Ed. 458, where the court says:

“By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of a felony, and then only for the purpose of bringing the offender before a civil magistrate.”

See also:

United States v. Snyder, 278 Fed. 650, at page 653.

United States v. Slusser, 270 Fed. 820.

State v. Gibbons, 118 Wash. 171.

State v. One Hudson Automobile, 190 N. Y. S. 481.

United States v. Myers, 287 Fed. 260.

(2) Assuming the agents could see gunny sacks with the outline of bottles therein, that was not proof to their senses that the bottles contained liquor.

Of course, the only crime which the agents could suspicion when they saw the "Dragon" coming up the river, was that the occupants were possessing and transporting liquor, which under the statute are mere misdemeanors. The fact that they could see the outline of bottles in gunny sacks, would only afford a ground of suspicion that the bottles contained intoxicating liquor. Mere suspicion that a citizen is committing a misdemeanor never justifies his arrest.

In the case of *Snyder v. United States*, 285 Fed. 1, decided by the Circuit Court of Appeals for the Fourth Circuit, last November, the facts were as follows:

The defendant, while standing on one of the public streets of Wheeling, W. Va., was approached by a federal prohibition officer, who, observing the in-

side pocket of his overcoat bulging out and the neck of a bottle protruding therefrom, walked up to him, placed one hand on his shoulder, remarked that he "had beat him to it," forcibly lifted the bottle half-way out of the pocket with the other, and finding it to contain a liquid of the appearance of whiskey, placed him under arrest, searched him and found three other bottles of whiskey on his person. In passing on his petition for suppression of the evidence, thus obtained, the court says:

"What we are therefore called on to determine is whether evidence of a misdemeanor obtained under the circumstances hereinabove enumerated is, where seasonable motion for its suppression has been made, admissible at the trial.

"That an officer may not make an arrest for misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, containing intoxicating liquor then it would seem to follow without question that the arrest and search, without first having secured a warrant, were illegal. And that his only justifi-

cation was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty, or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whiskey, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful.

"It follows from what has been said that the evidence of the misdemeanor charged in this case was illegally required; and this brings us to the question in the case, namely, whether evidence so illegally acquired should have been excluded in the trial subsequently had.

"The federal courts have therefore adopted the policy of excluding evidence illegally obtained by a federal officer, whether the evidence so obtained was by an unlawful invasion of his home or of his person, on the ground that to hold otherwise would be to require him to supply evidence against himself. So fully have these questions been discussed in recent opinions of the supreme court that we regard anything more than a reference to the case as useless, as well as wholly out of place. *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915 B, 834, Ann. Cas. 1915 C, 1177 *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; *Gould v. U. S.*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; *Amos v. U. S.*, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654."

We can not see how the court can distinguish between a case where the bottle was hidden by the cloth of an overcoat and where it was hidden by the burlap of a gunny sack.

In the recent case of *United States v. Myers*, 287 Fed. 260, where a prohibition agent observed what he thought were indications that the driver of an automobile was intoxicated, stopped and searched the automobile with a drawn pistol in his hand, and found liquor in the automobile, it was held that such search was illegal, under the Fifth Amendment to the United States Constitution, as compelling one to give evidence against himself; the mere supposition that the driver of the automobile was intoxicated not bringing the facts within the principle of the cases dealing with probable violations of law, such as where an officer sees liquor being loaded on an automobile, or plainly sees liquor leaking from a vehicle in which it is being transported.

In the case at bar as far as appears from the record, the agents had no positive information that the defendants were violating any law nor was there anything in their conduct that apprised them of any such fact.

In addition to the federal cases cited, we invite this court's attention to the following state cases, holding that the securing of evidence on the arrest and search of one for a misdemeanor without warrant and on suspicion is invalid and required the suppression of evidence so obtained.

Heaton v. Commonwealth, 243 S. W. 918.

People v. Forman, 188 N. W. 375.

Hughes v. State, 238 S. W. 588, 20 A. L. R. 639.

The trial court rested its decision overruling plaintiffs in error motion to suppress on two cases decided by this court. (Trans. p. 116.)

The case of *Vachina v. U. S.*, 283 Fed 35, and *Lambert v. U. S.*, 282 Fed. 413. The cases are clearly distinguishable. In the *Vachina* case, the officers seized a bottle and a demijohn of liquor, which were in plain sight on the floor in a public soft drink barroom. The crime was clearly being committed in their presence.

The *Lambert* case comes nearer sustaining the position of the trial court. In that case this court does not seem to have considered the distinction between the right of an officer to arrest in the case of a misdemeanor and a felony. He may only law-

fully arrest for a misdemeanor, when committed in his presence. He may arrest for a felony upon probable grounds for belief that it is being committed, *Kurtz v. Moffitt*, 115 U. S. 487, 29 Law. Ed. 458; *United States v. Snyder*, 285 Fed. p. 1. Assuming that Your Honors intended in the *Lambert* case to hold that the common law distinction between the right to arrest in the cases of misdemeanor and felonies has been abolished and that reasonable grounds for belief is sufficient in either case, yet the cases are distinguishable. In the *Lambert* case the officers could see a bottle of whiskey in the automobile and they had the testimony of an eye witness who saw it loaded into the car, and then they had the suspicious conduct of the defendant in seeking to sell the same in the cafes. In the case at bar, so far as the record shows, the agents had no direct or positive information as to the defendants being guilty of any crime nor was there anything in their conduct to "reasonably" lead the agents to believe that they were "actually engaged in a criminal act."

It follows that the evidence of the crime in this case having been illegally acquired, in that no valid search warrant was issued or executed or the search made pursuant to any valid arrest, that such evi-

dence should have been suppressed and there being no other or independent competent evidence of the guilt of the plaintiffs in error, the case should be reversed on this point and ordered dismissed.

ISSUE II

The Honorable Trial Court erred in overruling the demurrer to the indictment, because

POINT 1

It is bad for duplicity, because

(1) It joins counts that are not for the same act or transaction or of the same class of crimes or offenses.

The first count charges that the plaintiffs in error and *others to the grand jurors unknown* with the crime of conspiring to violate the National Prohibition Act, which is a felony. The second, third and fourth counts charge the defendants individually with the misdemeanors of importing, possessing and transporting intoxicating liquors.

It will be noticed that the first count charges a crime committed by the defendants charged jointly with others to the grand jurors unknown. The three remaining counts are restricted to acts done by the

plaintiffs in error alone. They would not be provable by the same evidence. The last three counts could no doubt be properly joined in one indictment but the inclusion of the first count was fatal.

McElroy v. United States, 164 U. S. 76, 17

Sup. Ct. 31, 41 L. Ed. 355.

Coco v. United States, 289 Fed. 33.

Brimie v. United States, 200 Fed. 726.

United States v. Connell, 285 Fed. 164.

This point was raised not only by demurrer but again at the opening of the trial by motion to elect and also again at the close of the trial when the motion to elect was renewed. (Trans. p. 160.)

ISSUE III

The Honorable District Court erred in refusing the plaintiffs in error the right to be tried by a fair and impartial jury, because

POINT 1

It required the jury be examined *en masse*.

In impanelling the jury the court directed counsel for the defendants to address his general questions as to the qualifications of jurors to the jury

en masse and not to repeat the same to each individual juror, to which ruling exception was saved. (Trans. p. 120.)

It would seem to be fundamental that both the government and the defendant in a criminal case should be given the freest right to inquire on the *voir dire* examination as to the interest, direct or indirect, of the individual jurors that may affect their verdict. While it is undoubtedly the law that the trial court has a discretion in regulating the examination or even of taking it in his own hands, the arbitrary requiring that the questions be asked *en masse*, seems to be so great an abuse of discretion as to constitute reversible error.

POINT 2

It denied the right to find if the verdict would represent the opinion of each individual juror.

Counsel for plaintiffs in error sought to ask the jurors this question: "If you were accepted on the jury, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jurymen did, except as they might influence you by legitimate argument? The fact that seven or eight or even more of the

other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?" The court denied the right to ask the question and exception was noted. Trans. p. 119.)

This ruling would seem to be error under the holding in *Allen v. United States*, 164 U. S. 492, 17 S. Ct. 154, 41 U. S. (L. Ed.) 528 at page 530.

ISSUE IV

The Honorable District Court erred in refusing plaintiffs in error the right to go into the legality of the arrest, search and seizure at the trial.

The petition for return and suppression of the evidence was tried on affidavits in advance of the trial and denied. At the trial counsel for defendants sought again on cross-examination of the federal agents to go into this question, which was by the court denied. (Trans. pp. 127, 128.)

Under exactly similar facts, in the recent case of *Gouled v. United States*, 298 U. S. 313, 65 L. Ed. 647, at page 654, the Supreme Court of the United States said:

"In the case we are considering, the certificate shows that a motion to return the papers, seized

under the search warrants, was made before the trial and denied; and that, on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant."

ISSUE V

The Honorable District Court erred in submitting the conspiracy count to the jury, because

POINT 1

There was no proof of the only overt act alleged to-wit, the importation of the liquor.

An examination of the indictment shows that the material part of the only overt act alleged in Count 1 (the conspiracy count) is as follows:

". . . . In order to effect the object of said conspiracy, the said conspirators, Joseph Fredericks, alias Joseph Watson, and Clarence Chambers, and each of them, from a foreign country, to-wit, British Columbia in the Dominion of Canada, on or about the 4th day of October, 1922, did carry and

transport in and on a certain gas boat known as the 'Dragon' to a place near Stanwood, Washington certain intoxicating liquors." (Trans. pp. 3, 4.)

This is clearly a charge of importation. There is no magic in words. To say that one unlawfully carried liquor from Vancouver, B. C., to Seattle, would be equivalent to saying that he had unlawfully imported it.

While the rule of variance between pleading and proof is technical, it is a doctrine necessary to the protection of the rights of the accused.

Guilbeau v. United States, 288 Fed. 731.

Proof of transportation is not proof of importation.

The motions for directed verdict made on behalf of each of the defendants, both at the end of the government's case (Trans. p. 144) and the conclusion of all the evidence (Trans. pp. 159-162), raised the question here discussed. The only overt act alleged was the act of importation from Canada. The court held that as to Count II, the charge of importation, that proof of the *corpus delicti* by evidence *aliunde* was necessary and that an extra judicial confession by the accused would not take the matter of importation to the jury. (Trans. p. 162.)

The holding of the court was correct on the following authorities:

Goff v. U. S., 257 Fed. 294.

Martin v. U. S., 264 Fed. 950.

Gordnier v. U. S., 261 Fed. 910.

Naftzger v. U. S., 200 Fed. 494.

U. S. v. Mayfield, 59 Fed. 118.

U. S. v. Boese, 46 Fed. 917.

Wharton's Criminal Law, Vol. 1, Sec. 360, p. 455.

We can not understand how the court could withdraw Count II from the consideration of the jury and direct a verdict of not guilty without doing the same as to Count I because the substantive charge of importation was the only overt act alleged in Count I, the overt act being an essential ingredient of the offense and it being the law that it must be proved as laid. There can be no escape from the conclusion that Count II should have been withdrawn from the consideration of the jury.

While this was true as to both counts *a fortiori* it should have been granted as to the defendant Fredericks because the only evidence (which was not sufficient, there being no independent proof of the *corpus delicti*, to prove the importation) was the alleged extra judicial confession of Chambers made

twenty-four hours after the arrest and not in the presence of Fredericks and, therefore, not binding on Fredericks. It must, therefore, be apparent to the court that the motion for a directed verdict of not guilty, should be granted as to Count I as well as Count II.

ISSUE VI

The Honorable Trial Court erred in its instructions given and refused on the charge of conspiracy, because

POINT 1

The instructions did not correctly define the law of conspiracy, because

(1) They failed to tell the jury that before one could be convicted of a conspiracy, it must be established that he acted pursuant to a mutual agreement.

The defendants requested the following instruction:

“Even though the evidence should convince you that each of the defendants acts illegally and maliciously, still unless you are further convinced beyond all reasonable doubt that such acts were done

pursuant to a mutual agreement and understanding, you must return a verdict of not guilty as to each of the defendants on Count I." (Trans. p. 175.)

The foregoing requested instruction is a correct statement of the law and should have been given. As pointed out by Judge Rudkin in the recent case of *Simpson v. United States*, 289 Fed. 188, a conspiracy to commit a crime does not necessarily exist whenever two or more persons are in anywise implicated in its commission.

Lucadamo v. U. S., 280 Fed. 653.

U. S. v. Johnson, 26 Fed. 682.

Rex. v. Pywell, 1 Stark. 402.

Newall v. Junkins, 26 Pa. 159.

Fed. Crim. Law, Zoline, Sec. 1029.

U. S. v. Vannatta, 278 Fed. 559.

POINT 2

It deprived the plaintiffs in error of the benefits of their defense.

Assuming this court should hold that the extrajudicial statement of Chambers, made after the arrest and in the absence of Fredericks, that the liquor was secured at Pender Island was competent to carry to the jury the overt act charged in the con-

spiracy, i. e., the importation, nevertheless the plaintiffs in error had the right to have that disputed question of fact passed on by the jury under proper instructions. It is, of course, reversible error where the instructions do not present the theory of defendants' case, where the same is supported by evidence.

Calderon v. United States, 279 Fed. 556.

The theory of the defense on the conspiracy count was that the charge made in the only overt act alleged, the importation from Canada was false and the evidence of the defense, if believed, established it.

The following instruction given by the court and excepted to at the time in the presence of the jury is clearly erroneous and prejudicial:

"In order to establish a conspiracy there must be three things established. One is the conspiring together, the co-operating, the confederating, the conduct of the parties that so inter-relate into each other as to preclude a conclusion other than that there was a conspiracy and understanding to do the particular thing that is charged. And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the national prohibition act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial

what that act is. It might be sailing a boat down the stream, or it might be carrying cargo or the prohibited commodity in a boat. *It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient if they have proved one act that would carry forward the conspiracy.*" (Trans. p. 164.)

"The court withdrew,—as I stated a moment ago briefly—Count 2. There is a difference between Count 2, importation, and the conspiracy count. Now, a conspiracy may be completed and effected without bringing in a drop of liquor as charged. Without bringing in any liquor, if the parties entered into a conspiracy to violate the national prohibition act, to import liquor from British Columbia, and one of the persons then does anything to effect that object,—this is simply for the purpose of illustration,—if he writes a letter to carry it forward, or if he runs a boat around the bay, if he does anything,—*it is immaterial what it is,—to effect the object of the conspiracy, why then the offense is complete without bringing in any of the liquor.* But to import any liquor into the United States, that means to bring it in. They must actually bring the liquor in before they would violate the importation act. But under the conspiracy act, that is not necessary. I merely go a little into that detail because of the argument that was made before you by counsel for the defendants." (Trans. p. 166.)

The court was requested and refused to give the following:

“If you should, however, be satisfied as to the existence of such conspiracy, you must then consider whether or not the overt act charged in the said First Count of said indictment has been proved beyond reasonable doubt. Such overt act must be proved as laid in this indictment, that is, that on or about the 4th day of October, 1922, the said defendants Joseph Fredericks and Clarence Chambers, and each of them, from a foreign country, to-wit, British Columbia in the Dominion of Canada, did wilfully, knowingly and unlawfully carry and transport in and on said gas boat known as the ‘Dragon’ to a place near Stanwood, Washington, the intoxicating liquors described in said indictment for the purpose of selling, bartering, exchanging, giving away, furnishing and otherwise disposing of said liquors in violation of the national prohibition act. And unless such overt act is proven as it is charged in the indictment and as I have stated it to you, the crime charged can not be found by you to have been proven and you must return a verdict of not guilty as to each of the defendants on said Count I. (Trans. p. 174.)

“I instruct you that if you should find from the evidence in this case that the defendants received this liquor on board the gas boat ‘Dragon’ near Deception Pass, in the State of Washington, knowing it to be liquor, they would be guilty of a violation of law, yet you could not convict either one of

these defendants upon either the first or second counts in this indictment, because to convict the defendants on said counts, you must find beyond a reasonable doubt that they brought the liquor into the United States from British Columbia." (Trans. p. 175.)

To the refusal of the court to give the requested instructions, the defendants saved their exceptions in the presence of the jury.

The giving of the above instructions and the refusal of the court to give the instructions requested by the defendants, and also the overruling of defendants' motion for a directed verdict, raises as the ultimate issue on this point the question: *Where a count for conspiracy in an indictment alleges but one overt act, can the government sustain a conviction upon the proof of other acts not charged in the indictment or must it prove the only overt act alleged as laid?*

It has been held so repeatedly under section 37 of the Penal Code of the United States that an overt act must be charged and proved as an essential ingredient of the crime of conspiracy that no citation of authority is necessary. It is equally well settled by the federal decisions that in a prosecution of conspiracy where there are a number of overt acts

alleged in the indictment, all need not be proven to sustain a conviction provided that one is.

Tacon v. United States, 270 Fed. 88.

It is equally elementary that an overt act, being an essential ingredient of the crime, that where the government elects to rely upon one specific overt act, it is held to the proof of that overt act as charged.

The trial court so stated the law in the recent case of *United States v. Ault*, 263 Fed. 800: "Overt acts must be proved as laid in the indictment. *U. S. v. Newton*, B. C., 52 Fed. 275 at p. 285." A reading of the case cited by His Honor in that case (the *Newton* case) discloses that the defendants were there charged with a scheme to defraud the United States by mailing a large number of old newspapers for the purpose of fraudulently increasing the weight of mail (transported over a railway post route during a period fixed by the postal authorities for weighing such mail matter, as a basis for ascertaining the satisfactory compensation to be paid the railway company). As an overt act, it was alleged that the newspapers were mailed between certain towns and at the trial evidence was permitted to be introduced in reference to certain alleged remailing from a different town than that alleged in the overt act. The court told the jury:

“That evidence can not be taken as proving the overt act or act performed to carry out the object of the conspiracy, as stated in the second point submitted in these instructions. *Such overt act must be proved as laid in the indictment*; that is that within this district there was mailed from Des Moines, during said weighing period, over said post route, the mail matter described and as described in the indictment; *and unless such overt act is proven as it is laid in the indictment* and as I have stated it to you, the crime charged can not be found by you to be proven.”

The learned editors of Corpus Juris, in volume 12, page 626, state the law as follows:

“As in other criminal prosecutions, on the trial of an indictment for conspiracy the proof must carry out and support its material averment and if the offense intended is stated with unnecessary particularity, it should be proved as laid. On the other hand, immaterial variance is not fatal to conviction.

“The purpose or object of the conspiracy must be proved as laid in the indictment.

“Likewise the means to be employed in effecting the object of the conspiracy and *overt acts in execution thereof must be proved as charged*. However, if several overt acts are charged it is not necessary to prove them all.”

Under the evidence introduced at the trial, no doubt had there been different overt acts charged

in the indictment, there would have been evidence upon which a verdict of conviction on the conspiracy count, which could have been sustained. The district attorney could have charged that the defendants, as an overt act, brought the boat "Dragon" into the mouth of the Stillaguamish River. However, he did not see fit to do so but elected to rely upon the specific charge that the defendants did on the 4th day of October bring in liquor on the boat "Dragon" from a foreign country, to-wit, Canada. The overt act is clear and specific and the government, having relied upon that one overt act as the sole overt act, is restricted to the proof of that act as laid.

The case of *Rabens v. United States*, 146 Fed. 978, was a case in which the defendants were indicted for a conspiracy to rob a postoffice at Latta, South Carolina. The evidence tended to show the conspiracy was one to rob banks and businesses generally. The Circuit Court of Appeals of the Fourth Circuit in deciding the case says:

"The count upon which the plaintiff in error was indicted is clear and specific, and leaves no doubt as to the offense charged, to-wit, a conspiracy to rob the postoffice at Latta. There is no allegation in the count which can in any way be construed to

mean a general conspiracy to rob. The district attorney could undoubtedly have charged a general conspiracy to rob. However, he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the postoffice at Latta. Therefore evidence tending to show a general conspiracy was incompetent and should have been rejected by the court. The government having relied upon a count charging a conspiracy which is restricted to one transaction, it was incumbent that it should satisfy the jury beyond a reasonable doubt that the plaintiff in error entered into a conspiracy with intent to rob the postoffice at Latta, as alleged. The case of *Commonwealth v. Harley and another*, 7 Metc. (Mass.) 506, is on all fours with the case at bar. In that case it was held that the averment in an indictment for conspiracy charging defendants with a conspiracy to defraud A, was not supported by proof that they conspired to defraud the public generally or individuals whom they might meet and be able to defraud.

“A careful inspection of the record leads us to the conclusion that the introduction of evidence by the government tending to show a general conspiracy without showing that the defendant had knowledge that the robbery of the postoffice at Latta was contemplated by the conspirators was prejudicial to the plaintiff in error, and no doubt resulted in his conviction on all the counts; and, whereas, there is no evidence to justify a conviction of the plaintiff in error on the other counts, we are of opinion that the plaintiff in error is entitled to a new trial. The judgment of the Circuit Court is therefore reversed,

and the cause remanded, with directions to grant a new trial."

To the further effect that an overt act alleged in the indictment must be proved, see *United States v. Johnson*, 26 Fed. 682; *Ecock v. State*, 82 N. E. 1039; *Com. v. Ellis*, 118 S. W. 973.

It is, of course, elementary that one of the purposes of an indictment is to advise the court of the charge and to advise the defendant of what he must meet as otherwise a defendant might be entrapped if it were permissible to charge him with the commission of a crime in one manner and permit it to be proved in another.

In the case of *Naftzger v. United States*, 200 Fed. 494, the defendant was indicted for receiving and converting to his use United States postage stamps. The indictment alleged that the stamps had been stolen from the United States at certain postoffices of the United States in the State of Kansas. It was entirely unnecessary to have alleged that the stamps were stolen from "certain postoffices in the State of Kansas" and the government was unable to prove at the trial that the stamps had actually been stolen in the State of Kansas, and had this not been alleged in the indictment, it would not have been necessary to have proved it.

The Circuit Court of Appeals of the Eighth Circuit, page 496, uses the following language:

“Counsel for the government contend that the recital of the indictment that the stamps were stolen from ‘certain postoffices in the State of Kansas’ is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but, having been alleged, the evidence must conform to and support the allegation. The return of an indictment is the work of the grand jury only—a coordinate branch of the court. It is for that body, and for no other officer, to say what shall and what shall not be charged, because the fifth amendment to the Constitution declares that:

“‘No person shall be held to answer . . . for an infamous crime, unless on a presentment or indictment of a grand jury.’

“In effect the government now insists on amending the indictment by striking out the words ‘from various postoffices in the State of Kansas.’ That was what was in fact done in the case of *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, a case against a national bank officer for falsifying the books with intent to deceive the United States, depositors and others, ‘and the Comptroller of the Currency.’ The words ‘Comptroller of the Currency’ need not have been alleged. Those words on motion of the United States attorney were stricken

out by the court as surplusage. After conviction the Supreme Court, in habeas corpus proceedings, held the judgment to be void. It was conceded that there was no necessity to allege that the comptroller was deceived, as we concede that it would be a crime to knowingly receive stolen stamps from wheresoever stolen from the government. But it is alleged that the stamps were stolen within the State of Kansas.

“An indictment is for the purpose of conferring jurisdiction and advising the court of the charge, and to advise the defendant of what he must meet; and if, after thus advising the defendant that the stamps were stolen in Kansas, the government can be allowed to show that they were stolen in some other state, such an allegation is misleading, and can be used as a snare to deceive a prisoner. In Iowa, for keeping a gambling house, an indictment is sufficient which charges the building to have been within the county. But in *State v. Crogan*, 8 Iowa 523, the allegation was that the building was on a certain lot within the county. The evidence showed that the building was on a lot other than as charged. Held, that a verdict of acquittal should have been directed; the opinion reciting:

“‘In this case it was not necessary for the pleader to have stated the location of the house kept, further than to show the proper venue. Having alleged, as a matter of local description, that it was upon a particular lot, the proof should have sustained the allegation. The instruction should have been given.’ Citing section 281, Wharton’s Criminal Law, and other authorities.”

So in this case under the trial court's instructions, while the defendants were charged with having transported this liquor from Canada to near the town of Stanwood, under the court's instructions the jury were permitted to find the defendants guilty without proof of this fact and on the proof that the defendants were seen on the boat in the vicinity of La Conner. This violates every principle of criminal law.

It was pointed out by the Supreme Court of the United States in the case of *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 Law Ed. 849, that when an indictment is filed with the court, no change can be made in the body of the instrument either by order of the court or by the United States attorney without a resubmission of the case to the grand jury and the fact that the court may deem a change immaterial, as striking out surplus words, makes no difference, that the instrument is the work of the grand jury which presented it and the charges therein contained must be proved as charged by the grand jury, and that a conviction on a trial and presentation of facts other than in accordance with the charge as made by the grand jury in the indictment, is void.

Where an indictment sets forth unnecessary matter of description or avers the commission of an offense in a certain manner, although such allegation was not necessary, it must be proved as laid.

U. S. v. Porter, Fed. Cases 16074.

U. S. v. Keen, Fed. Cases 15510, 1 McClain 429.

U. S. v. Brown, Fed. Cases No. 14666, 3 McClain 233.

Schroeder v. State, 241 S. W. 169.

State v. Herrera, 207 Pac. 1085.

Arbetter v. State, 186 S. W. 769.

White v. State, 198 S. W. 964.

State v. Potter, 186 N. W. 919.

Lowell v. People, 82 N. E. 226.

State v. Vetrano, 117 A. 460.

It can not, of course, be disputed that although the evidence on a trial might show a defendant guilty of some other crime, he can only be convicted of the crime with which he is charged. In the case of *Einziger v. United States*, 276 Fed. 905, defendants were charged with having conspired to sell intoxicating liquors. The overt acts as laid in the indictment were that one of the defendants endeavored to deliver liquors to one Brown, whom the defendants thought was a person desiring to buy liquor

but who in fact was a prohibition agent engaged in detective work. Second, that in attempting to deliver the liquors, the defendants transported them through the streets of Trenton to a certain garage. The government introduced evidence from which the jury might find the conspiracy to transport but no evidence from which it could be inferred that the defendants were conspiring to sell. The defendants moved for a directed verdict which the trial court denied. The Circuit Court of Appeals at page 907, says:

“That the defendants when caught were violating some provision of the Volstead Act (41 Stat. 305) is quite clear. But whether they had conspired to violate the provision of the act forbidding the sale of intoxicating liquors for beverage purposes—judged alone from what they were doing with the liquors when caught—is not so clear. *Conspiring to sell liquor was the sole offense with which they were charged. It was, therefore, the only offense of which, under the indictment, they could be convicted.* To sustain the verdict that the defendants were guilty of the crime of conspiring unlawfully to sell intoxicating liquors, there must of course have been evidence of a sale, contemplated, in progress or completed. Obviously this is true, for if the defendants when caught were merely transporting liquor for themselves or for others, or were doing anything with it other than carrying out a conspiracy for its sale, they were, however guilty

of other offenses—not guilty of the one for which they were being tried.

“In all human likelihood a sale was involved somewhere in the transaction. Yet a lawful conviction for conspiracy to effect such a sale can not be had except on evidence. No evidence of a sale is disclosed in the record. The nearest approach to it was the statement made by the witness Brown that Einziger’s purpose in seeking the secretary was to receive from him pay for the liquor. It may have been. Yet this was only Brown’s conclusion of Einziger’s purpose and was nothing more than an inference from testimony which was equally capable of raising an inference that the defendants were merely transporting liquor. Evidence of a sale can not be gathered from the fact of transportation alone.”

The foregoing is very analagous to the situation here. While in the indictment in the case at bar, the defendants are charged with the conspiracy to import, possess and transport, the only overt act alleged in the indictment is that of importation. There is evidence of an overt act of transportation but that is not the overt act charged by the government and so as was said in the *Einziger* case *supra*, “that the defendants when caught were violating some provisions of the Volstead Act is quite clear” but that they imported the liquor, which was the sole overt act with which they were charged in the in-

dictment, was not proven and as that was one of the essential elements of the crime charged in the indictment, therefore, there was no evidence upon which their conviction upon the conspiracy count could be sustained. If the grand jury had charged that the overt act consisted either of the possession or transportation of the liquor at the mouth of the Stillaguamish River, then possibly the conviction could be upheld. Obviously no matter how guilty the defendants may be of conspiracy or any other offense, they are not guilty of the one with which they were charged in the indictment.

POINT 3

The instructions were misleading in that they told the jury they could find the plaintiffs in error guilty on overt acts not alleged in the indictment.

The *Einziger* case above referred to illustrates a further error in the case at bar which runs through the charge of the Honorable District Court to the jury. In the *Einziger* case, the court says:

“Aside from error in submitting the case on evidence which we think does not sustain the verdict, we find a vein of error running through the charge. In the beginning the learned trial judge directed the attention of the jury to the crime charged by

the indictment, namely, conspiracy to sell liquor in violation of a law of the United States, and correctly instructed them on the law. But thereafter, in elaborating the law of conspiracy, the learned trial judge drifted—quite unconsciously—from the offense particularly charged by the indictment and extended his remarks to a conspiracy to violate the Volstead Act generally, conveying to the jury, we are constrained to believe, the idea that if they found the defendants had violated the Volstead Act in any of its provisions they should return a verdict of guilty. It was, of course, obvious to the jury that the defendants when arrested were violating some provision of the Volstead Act and it was inevitable that they would, under these general instructions repeatedly made and differently phrased, return a verdict of guilty; but whether the jury would have returned such a verdict if the court's instruction had been addressed and limited to a conspiracy to violate that part of the Volstead Act which forbids the sale of liquor, no one can say.

“Rules of law, whether pertaining to evidence or to the charge of the court in a case arising under the Volstead Act, differ in no respect from like rules applicable in other cases.

“We are constrained to find prejudicial error in the trial and to hold, in consequence, that the judgment below must be reversed and a new trial awarded.”

So when we examine carefully the charge given in this case, we will see that while as abstract propo-

sitions the trial court's references to the law of conspiracy are no doubt correct, but that in elaborating upon the law of conspiracy he drifted, no doubt quite as unconsciously as did Judge Bodine, the trial judge in the *Einzig* case, away from the offense particularly charged by the indictment and extended his remarks to a conspiracy to violate the Volstead Act generally. His Honor told the jury correctly enough that they must find that the defendants entered a conspiracy to do the particular thing charged, then he went on to say:

“And then the next is to commit the offense,—the conspiracy to commit in this case the violation of the national prohibition act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down stream, or it might be carrying the cargo or the prohibited commodity in a boat. *It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient if they have proved one act that would carry forward the conspiracy.*” (Trans. pp. 164-165.)

From the foregoing language the jury were clearly lead to believe that irrespective of the fact that the indictment charged as the only overt act that

the defendants had imported the liquor from Canada, they could entirely disregard this charge in the indictment and if they found that the defendants had done any other acts, not charged in the indictment, to violate the Volstead Act in any of its provisions, they should return a verdict of guilty. Under the doctrine of the *Einziger* case, this was clearly prejudicial error.

The Honorable District Court in passing on the motion of the plaintiffs in error for a new trial inferentially admitted that, if our construction of the overt act alleged in the conspiracy count was correct, the correctness of our contention would follow, but placed his decision on the ground that the use of the words "from British Columbia" in describing the overt act was a mere recital that could be disregarded. (Trans. p. 177.) We know of no rule of law or grammar that permits of such conclusion, nor was any cited either by the government or the court. Certainly a man's liberty does not hang on some obscure construction of a plain averment. The plaintiffs in error were brought into court to meet the issue that they had unlawfully imported this liquor from Canada. They came prepared to meet that issue and that issue only. No competent evidence was presented against them on

that issue and they were convicted on evidence of overt acts not alleged.

It would certainly be unfair to charge one with bringing liquor from Olympia to Seattle and then permit him to be convicted on evidence that he brought it from Vancouver to Stanwood. Unless this court is prepared to hold that a defendant in a conspiracy case, can be convicted on overt acts not alleged, this case must be reversed, for in view of the erroneous and prejudicial instructions, the jury could not do otherwise than convict.

We submit that it clearly appears that error was committed in the following material matters to the prejudice of plaintiffs in error:

(1) The evidence upon which they were convicted, was obtained by a most outrageous violation of their constitutional rights. This necessitates the reversal of the judgment and dismissal of the action.

(2) The indictment was duplicitous and contained improper joinder of counts. This necessitates the dismissal of the action.

(3) Their rights to an impartial jury were denied. This necessitates the granting of a new trial.

(4) Their right to show the invalidity of their arrest and search was denied at the trial. This necessitates the granting of a new trial.

(5) There was a fatal variance between the overt act charged in the conspiracy count and the proof, entitling them to a dismissal on that count. This necessitates reversal of the judgment as to this count and dismissal thereof.

(6) The instructions of the court were erroneous and prejudicial on the law of conspiracy. This necessitates the granting of a new trial.

From each and all of these standpoints, the conviction of the plaintiffs in error was wrong. Being contrary to principle and precedent, we submit the judgment should be reversed, with instructions to dismiss the action, or in any event the granting of a new trial.

Respectfully submitted,

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**In the United States
Circuit Court of Appeals**
For the Ninth Circuit

JOSEPH FREDERICKS and CLARENCE CHAMBERS,
Plaintiffs in Error,
—VS.—

THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge*

BRIEF OF DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

Plaintiffs in Error, Joseph Fredericks and Clarence Chambers, were in the District Court for the Western District of Washington, Northern Division, charged by indictment with (1) violation of Sec. 37 P. C., viz., conspiracy to violate the Act of October 28, 1919 (National Prohibition Act), by the im-

portation, possession and transportation of intoxicating liquors, the overt acts alleged being that said defendants did, "from a foreign country, to-wit, British Columbia, in the Dominion of Canada, on or about the 4th day of October, 1922 * * * carry and transport in and on a certain gas boat known as the "Dragon" to a place near Stanwood, Washington * * * certain intoxicating liquors, to-wit, 2628 bottles each containing 1/5 of one gallon of a certain liquor known as whiskey, and 92 bottles each containing 1/5 of one gallon of a certain liquor known as gin * * *; (2) importation on the same day of the same quantities of intoxicating liquor from British Columbia, contrary to the National Prohibition Act; (3) possession on the same day at the town of Stanwood, Washington, of the same quantities of intoxicating liquor, contrary to the National Prohibition Act; (4) transportation on the same day at Stanwood, Washington, in the gas boat "Dragon" of the same quantities of intoxicating liquor, contrary to the National Prohibition Act. (Tr. pp. 2-8).

This indictment was presented to the court and filed on October 26, 1922 (Tr. p. 8) and thereafter, on the 1st day of November, 1922, defendants made and filed their joint "Motion to Quash Indictment

and for Return of Property." (Tr. pp. 9-12), on the grounds that the search, seizure and arrest were without warrant in law. This motion was, according to its terms, based on (1) affidavit of defendants theretofore filed in this cause setting up that the sacks containing the liquor were inside the cabin of the boat and invisible to persons outside of the launch; that the arresting officers did not claim to have a search warrant and that they at no time exhibited, read or delivered to defendants a copy of same; that the affidavit for the search warrant was insufficient (Tr. pp. 60-69); (2) certified transcript of the testimony of S. C. Linville, Federal Prohibition Agent, and one of the arresting officers, given before the United States Commissioner at the preliminary hearing in this case on the 10th of October, 1922 (Tr. pp. 70-80), the testimony being in substance that the defendants were apprehended proceeding up the Stillaguamish river toward Stanwood in the "Dragon" on October 4, 1922, late in the afternoon; that the agents showed their badges, announced that they were federal officers, and to stop the boat as they had a search warrant, that the search warrant was *not* exhibited or read to defendants before the seizure, but was left on the boat in the pilot house after defendant Chambers had

been taken to the hospital; that at that time the defendant Fredericks was on board the gas boat.

Thereafter, for the purpose of controverting the defendants' affidavit, the Government filed the affidavits of certain Prohibition Officers and one individual who assisted in the arrest, viz.: Walter M. Justi (Tr. pp. 80-89), S. C. Linville (Tr. pp. 89-90), Wm. J. Griffiths (Tr. pp. 90-91), and Oscar Hanson (Tr. pp. 91-92). Therein the affiant Justi averred that:

“That as the said gas boat was proceeding up the said channel slowly against the current towards the town of Stanwood, and when it was at a distance of 75 feet or more from this affiant, he saw clearly and plainly piled in the cabin of said boat a large number of gunny-sacks and saw that said boat was heavily loaded with said gunny-sacks; that this affiant saw and observed that the said gunny-sacks were the same kind and dimensions and sewed and tied in the same manner, with two ears at one end, as are used to contain whiskey and intoxicating liquor; that the said sacks were piled up above the ledges of the windows in said cabin; that the outlines of the bottles were visible through the gunny-sacks; that this affiant has seen a large number of such sacks in his experience as Prohibition Agent covering about a year; that this affiant knows from experience the containers and sacks of whiskey

and gin and believed that the sacks which he saw on board the gas boat 'Dragon' were sacks of intoxicating liquor, and that said boat was heavily laden with said liquor; that the cabin window on the right hand side; which was the side of the gas boat next to this affiant and his companions, was left down from the top and that he observed the said sacks of liquor through said windows; that he also observed the said sacks of liquor piled in the cabin through the window of the pilot-house and the partially open door between the said pilot-house and the said cabin; that this affiant observed the said liquor some appreciable time before any of the officers disclosed themselves or ordered the boat to stop, and that this affiant was looking at said boat and the said liquor while the boat traveled at least the distance of 50 feet and that this affiant called the attention of his companions to the said liquor. That before the prow of said boat came abreast of any of the said officers and when it was about twenty feet away from the said officers, all of the said agents arose from behind the dike where they were stationed and observed the said boat and agent S. C. Linville in a very loud and commanding tone of voice stated: 'Stop that boat. We are Federal Prohibition Agents. We have a search-warrant for your boat and you are under arrest. Stick her nose into the bank there.' That all of the said prohibition agents had their badges pinned on the outside of their coats and that said badges were

of bright polished metal and were plainly visible to the defendants."

The remainder of the affidavits above noted are but substantial reaffirmations of the allegations in Justi's affidavit.

Thereafter there was filed by each of the defendants a supplemental affidavit (Tr. pp. 92-98) which consisted of reaffirmations of the matters contained in defendant's first affidavit and a denial of the matters contained in the Government's controverting affidavits. At the same time defendants filed the affidavits of Geo. R. Myron (Tr. pp., 98-100) Martin N. Leque (Tr. pp. 101-102), and Eric Sederstrom (Tr. pp. 102-103), which supported defendants' statements that the liquor was not visible to one standing off the boat and that no search warrant was exhibited. The joint affidavit of J. W. Reynolds, George J. Ketchum, L. P. Hanson and C. W. Broxaw was thereafter filed by the Government for the purpose of showing that Myron, Leque and Sederstrom were some 720 feet away from the "Dragon" at the time it was seized and not in a position to see whether the liquor was visible to one off the boat or whether the warrant was exhibited or to hear the words which passed between the parties before the arrest. (Tr. p. 103)

At the same time the additional joint affidavit of Walter M. Justi and S. C. Linville, prohibition agents, was filed by the Government controverting the affidavits of Myron, Leque and Sederstrom. Further affidavits filed by the Government, those of E. O. Matterand (Tr. pp. 107-109), L. D. Angevine (Tr. pp. 110-112), William Rouse (Tr. p. 112), and Dr. O. F. Starr (Tr. p. 112), supported the Government's contention that the liquor was plainly visible through the boat windows before she was stopped.

On this record defendants' motion to quash indictment and petition to return property came on for hearing before the District Judge and thereafter on the 7th of December, 1922, the court's decision was filed denying said motions on the ground that no search warrant was needed to effect a seizure under such circumstances and finding that "the defendants' contention that curtains were drawn over the windows of the boat, thus hiding the liquor, is not sustained." (Tr. pp. 113-116).

Thereafter on the 8th day of January, 1923, the several defendants entered their pleas of "not guilty" (Tr. p. 16) and thereafter on the same day defendants interposed their joint demurrer to the indictment herein on the grounds (1) that the

indictment was insufficient in law, (2) that there was an improper joinder of offenses therein, (3) that the indictment was duplicitous, (4) that the indictment was defective for uncertainty. (Tr. pp. 13-15) Thereafter, on the 24th day of January, 1923, the court filed its written decision overriding said demurrer. (Tr. pp. 117-118)

Thereafter, on the 20th day of February, 1923, a jury was duly sworn and empaneled to try this cause. (Tr. p. 17) The testimony adduced by the Government showed: That the defendants had been seen together on the gas boat "Dragon" during the month of September at least four times by E. O. Matterand, a farmer on the South Fork of the Stillaguamish river near Stanwood. (Tr. pp. 138-139) That on the afternoon of Sunday, October 1st, 1922, the "Dragon" was seen to go out of the north channel of the Stillaguamish river, west towards the Sound. (Tr. pp. 121-138) That about one o'clock in the afternoon of October 4th, 1922, the "Dragon" was seen by the Federal agents in Mud Bay in the mouth of the south channel of the Stillaguamish river near Stanwood, Washington. (Tr. p. 121) Her movements were watched until about 4 o'clock P. M., when the boat weighed anchor and proceeded a short distance inside the channel to

Snaggy Point where she tied up. (Tr. p. 121) The agents had by this time taken a position behind a dike on the south fork of the Stillaguamish river at a point where its navigable portions run very close to the bank. (Tr. p. 121) About 5:30 o'clock P. M. the "Dragon" left her mooring and proceeded up the river. When she came opposite the three agents, they rose up on the dike, called out to stop the boat, that they were Federal agents and had a search warrant. No regard was taken of this command but the boat started ahead at greater speed and a shot was fired across her bows to supplement the verbal command. The engine was finally put in neutral and the boat began to drift down stream. All this time the Federal agents could see through the windows the gunny-sacks containing the liquor. The curtains to the cabin were not drawn and were parted in the middle. Sacks full of liquor were also visible through the pilot house door. (Tr. p. 122) The bottoms of the bottles could be distinguished through the burlap sacks and were so visible prior to the time the command to stop was given. (Tr. p. 123) Defendant Chambers, who was acting in the capacity of pilot, darted from the pilot house to the engine room and was wounded in the leg by one of the agents. (Tr. p. 123) The Federal agents had

been informed that the defendants were heavily armed and believed that defendant Chambers had jumped into the cabin for the purpose of securing firearms. (Affidavit of Walter M. Justi, Tr. p. 85) After the shot was fired the defendant Fredericks brought the boat into the bank. The boat was then boarded by Agent Linville who carried a revolver in one hand and the search warrant in the other. (Tr. p. 124) Besides the liquor involved, there were found on the boat two Mauser automatic pistols with stocks so adjusted that they might be converted into short rifles and two rifles. They were all loaded except the 38-55 rifle. (Tr. p. 136) The defendants in their testimony denied all knowledge of the liquor which filled their boat and claimed that they were transporting sacks, the contents of which were unknown to them, as a favor to a stranger, to Stanwood, Washington. (Tr. pp. 145-153) The jury did not believe this testimony and its detail is, therefore, not material to the questions now raised.

At the conclusion of the trial the jury returned a verdict of guilty as charged on Counts I, III, and IV of the indictment. (Tr. p. 20) and thereafter motions for a new trial (Tr. p. 22) and in arrest

of judgment (Tr. p. 31) were interposed and later denied. (Tr. p. 177)

We shall discuss the errors assigned by defendants under the classifications and in the order treated in their brief.

ARGUMENT

I. THE LEGALITY OF THE SEIZURE

We do not deem it necessary to enter into a discussion of the questions raised by Points 1 and 2 under the issue embodying the contention that the District Court erred in overruling defendants' motion to quash the indictment and for return of evidence. These points have to do with the validity of the search warrant and its execution. It may here be stated that plaintiff justifies the instant seizure and arrest not by any search warrant which the Federal agents may have had at that time but by the facts and circumstances under which the seizure took place.

On the record before it, we fail to see how the District Court could have arrived at any other conclusion than that the sacks of liquor were in plain sight before the seizure took place. The affidavits of George R. Myron, Martin N. Leque and Eric Sederstrom to the contrary are not very convincing

evidence in view of the undisputed fact that these affiants were some 720 feet away from the boat at the time it was seized (Tr. p. 103) and that neither of these could observe from their positions the windows on the right hand side of the boat, which was the side on which the agents were standing. (Tr. p. 106) In fact Myron in a later affidavit, contradicts himself and says (Tr. p. 110):

“That I could tell whether or not the curtains were up on the boat or hear clearly all the conversation between the men on the bank and the boat was impossible due to the distance I was from the scene of action.”

As we read the testimony of Agent Linville before the United States Commissioner at the preliminary hearing, we fail to see the claimed corroboration of the defendants' contention. Linville did testify that (Tr. pp. 70, 71):

“We lay behind the dike until she was directly opposite us and we could see sacks of liquor in the boat through the windows. * * *

Q. The boat had a cabin on it, had it?

A. Yes, a cabin practically the whole length of it, with the exception of a few feet at the bow.

Q. Any curtains on the windows?

A. Yes, at some of them there were curtains.

Q. And at some there were no curtains,

A. At some of them the curtains were pulled aside a little.

Q. All you saw was sacks?

A. Well, from experience with the liquor traffic, why it was very easy to distinguish that it was a sack of liquor, and not potatoes."

The force of counsel's contention, that mere suspicion of having committed a misdemeanor does not authorize arrest without a warrant, is lost when it is considered that one of the crimes of which defendants stand convicted is a felony. There has in recent years, however, sprung up a strong tendency on the part of the courts to uphold arrests without warrants for misdemeanors where the arresting officer has reasonable grounds for believing that the crime is being committed in his presence. This principle is well illustrated in two of Your Honors' own decisions:

Vachine v. U. S., 283 Fed. 35 and

Lambert v. U. S., 282 Fed. 413.

The facts in the latter case were that Federal Prohibition Agents, without any search warrant or warrant of arrest and acting on information received from one Edison and on the fact that defendant's automobile contained a package covered with canvas which afterwards proved to be a nailed up wooden box, together with a quart bottle full of

reddish liquid, arrested defendant and seized the car and its contents. The information furnished by Edison was that theretofore defendant had been seen in a soft drink parlor and that some conversation with reference to the price of liquor and an attempted sale of the same was had between him and the proprietor of the establishment. In that case Your Honors announced that:

“The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant.”

So in the instant case, the knowledge which led

the agents to apply for a search warrant, supplemented by the peculiar actions of the boat, the appearance of her cargo and the attempt to escape, was such as to reasonably lead the officers to believe that defendants were at that time actually engaged in the commission of a crime. We submit that under such circumstances it did not devolve upon the officers to let their quarry escape and make application for a search warrant and that they would have been derelict in their duty had they done so.

The case of *Snyder v. U. S.*, 285 Fed. 1 (4th C.C.A.) may, if necessary, be distinguished on the facts. It is a borderline case and it may be that the bulge and neck of a bottle protruding through defendant's overcoat would not reasonably warrant the inference that defendant was then engaged in the commission of a crime. But the circumstances and facts leading up to the arrest in the instant case were so much more strongly indicative of the commission of a crime that we do not deem the Snyder case authoritative. Nor do we think Your Honors would have decided the same way on the same state of facts. The dissenting opinion in the Snyder case, *supra*, states the law in this respect, as we understand it:

“When an officer is authorized by statute to arrest for a misdemeanor committed in his presence or on discovering a person committing a misdemeanor, to justify arrest the officer must have personal knowledge acquired at the time through his hearing, sight, or other sense of the present commission of the crime by the accused. But this does not preclude the idea that the requisite knowledge may be based on a practically certain inference drawn by a reasonable mind from the testimony of the senses. An offense is in the view of the officer when his senses afford him knowledge that it is being committed. *Elrod v. Moss* (C.C.A. 4th Circuit) 278 Fed. 130; *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672, 72 S.E. 51; *United States v. Borkowski* (D. C.) 268 Fed. 408, 412; 5 C. J. 416; 84 Am. St. Rep. 686, note. Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge, and his finding should not be disturbed on appeal unless it is without support in the evidence.”

To the same effect is *McBride v. United States*, 284 Fed. 416 (5th C. C. A.)

Authority for the arrest in this case was conferred by Section 26, Title 2, of the National Prohibition Act, authorizing officers to arrest any person discovered by them to be transporting liquor in any water craft.

The case of *United States v. Myers*, 287 Fed. 260 (D. C.), also relied on by defendants, is also clearly distinguishable on the facts, the only witness heard for the Government there testifying that:

“While riding in his automobile along one of the public highways leading into the city of Louisville he passed another automobile coming in the same direction. He observed what he thought were indications that the driver of the latter was intoxicated, and drove on until he came to a bridge. When he reached a point near its farther end he turned his automobile across it, got out, and drew his pistol. With that in his hand he went back to the other approaching automobile and halted it. Retaining the pistol in his hand, he proceeded, without the consent of the owner, to open the door of his automobile, searched it, and found whiskey in it. Asher at this time had no search warrant, nor had he the owner’s consent to search the automobile.”

Heaton v. Commonwealth, 243 S. W. 918
(Kentucky)

is not authority against us. We quote from the opinion:

“Only two witnesses were introduced for the Commonwealth and none for the defendant and the Commonwealth’s evidence shows that about Christmas 1921 a deputy sheriff of Harlan County with two or three others were watching out for persons who might be trans-

porting liquor; that they met appellant on the public highway and that that he had something tied upon in an apron, whereupon he was arrested and there was found wrapped up in the apron a quart of whiskey and another quart jar in his pocket; that the arresting party did not know what he had until after he was arrested and searched and none of them had a warrant for his arrest or a warrant authorizing a search of his person; and that he had not in the presence of the deputy sheriff or any of them violated any law * * * *The evidence in the case shows without contradiction that the officer and his party did not know what appellant had until they arrested and searched him and we take it from this that the package wrapped in the apron could not have been open and obvious to one within a reasonable distance, and that one passing appellant on the highway could not have ascertained from observation what the package contained and likewise it is apparent from this evidence that they did not and could not have known what was in his pockets."*

We take it that the Kentucky Court of Appeals would have decided differently had the officer spied not an apron but a boat load of gunny sacks showing clearly the outlines of bottles.

People v. Foreman, 188 N. W. 375 (Michigan), cited by counsel needs no comment except to quote the syllabus:

“Under Constitution, Article II, Section 10, relative to unreasonable searches and seizures, an officer suspecting one of having intoxicating liquor in his grip cannot search the grip without a search warrant unless invited to do so.”

Hughes v. State, 238 S. W. 588 (Tenn.), is an authority in our favor. The last syllabus states the holding of the court, and follows:

“Where an officer had seen accused bringing to his automobile a keg having the appearance of a nail keg from a direction in which there was no store or other place where nails could be obtained, and knew that accused was reported to be engaged in the unlawful sale of liquor, the officer was justified in believing that a violation of the law against transportation of intoxicating liquors, which was a breach of the peace, was about to be committed and in arresting accused without warrant and searching him for evidence to be used against him, so that liquor seized by the officer at the time of making the arrest is admissible in evidence against the accused.”

Finally, the arrest being valid, the search and seizure being incidental thereto were also lawful.

Weeks v. U. S., 232 U. S. 383, 58 L. E. 652.

II. THE INDICTMENT IS NOT DUPLICITOUS.

“Duplicity” is here misused by counsel. Duplicity

in an indictment consists in the joinder of two or more distinct offenses in one count.

Epstein v. U. S., 271 Fed. 282 (2nd C.C.A.)

The contention is that the several counts are not properly joinable in one indictment because (1) Count I charges a felony while the remainder of the counts are for misdemeanors, (2) the defendants in Count I are charged with conspiring together *and with other persons to the grand jurors unknown*.

Your Honors have decided the first point contrary to defendants in *Glass v. U. S.*, 222 Fed. 773. See also R. S., Sec. 1024, providing:

“When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.”

The fallacy of defendants' second contention in this regard is that the *other persons to the grand jurors unknown* are not joined as defendants in the first count. The allegation is merely that they were

co-conspirators and may be disregarded as surplusage.

Jones v. United States, 179 Fed. 584 (9th C.C.A.)

The cases cited by defendants to sustain a contrary position are either not in point or in our favor. Of the latter class is *McElroy v. U. S.*, 164 U. S. 76, 17 Sup. Ct. Rep. 31; 41 L. E. 355, wherein a consolidation for trial of two indictments against several defendants for assault with intent to kill, with another indictment against only part of them for arson committed on the same day, and with another indictment against all of them for arson committed two weeks later, *when there was nothing to show a conspiracy or to connect the transactions together*, was held erroneous. In *Coco v. U. S.*, 289 Fed. 33 (D. C.), the syllabus reads as follows:

“Under joint indictment, conviction of different defendants of distinct and separate offenses is improper.”

Brinnie v. U. S., 200 Fed. 726 (17th C.C.A.), is certainly not authority against us. The syllabus there reads:

“Where an indictment against two defendants charged in several counts several joint violations of the oleomargarine act [Act Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St.

1901, p. 2228)], and the evidence, except as to two of the counts, showed only separate offenses, and but one joint verdict was rendered, a conviction could not be sustained, except as to the two counts with reference to which the evidence justified a finding of a joint offense."

U. S. v. McConnell, et al., 285 Fed. 164 (D. C.), is more authority for the Government than defendants.

III. DEFENDANTS WERE NOT DENIED TRIAL BY AN IMPARTIAL JURY

Defendants complain at the District Court's requirement that their counsel on his *voir dire* examination of the jurors addressed his general quesitons as to the qualifications of the jurors to the jury as a whole. This was merely a time saving device on the part of the court to avoid unnecessary repetition in the case of each juror of the general qualifying questions usually asked a prospective juror and certainly did not result in prejudice to the defendants. It is significant that defendants have not seen fit to incorporate into the transcript of the record in this cause the questions which the court so directed to be put to the jury as a whole, and it must be presumed on appeal that the questions were of such a nature and of so general a char-

acter as to properly be directed to the jurors as a whole at the sound discretion of the court.

Error is not assigned to the court's refusal to permit counsel on his examination of one of the jurors to ask the following questions (Tr. p. 119):

"Q. If you were accepted on the jury, Mr. Priest, could the defendants rely upon you to vote for no verdict except what you thought was right irrespective of what the other jury-men did—

The Court. The question is not fair. Need not answer.

Q. —except as they might influence you by legitimate argument? The fact that seven or eight or even more of the other jurors would vote differently from what you thought was the right verdict would not influence you to vote that way?"

The court in refusing to permit such a question commented as follows (Tr. p. 119):

"That is not a fair question. What we want to find out is whether the jury knows anything about this case, whether they are prejudiced, whether they have any preconceived notions about it; not what they would do under or upon a certain state of facts."

It is obvious that in this ruling the court was correct. The court would no doubt have granted an instruction to this effect at the termination of the case, but such a question had no place on *voir dire*

examination, the only purpose of which is to determine the fitness and qualifications of those about to serve as jurors. The same point was raised in the *State of Washington v. Duncan*, 24 Wash. Dec. 293, where in making up the jury the appellant questioned one of them as follows:

“If you are sworn as a juror, will you, if the State proves possession, cause the defendant to prove that he did not have it for unlawful use?”

The court said:

“The objection to this question was properly sustained. It was the duty of the court to instruct the jury in questions of law involving this case, and, of course, the duty of the jury to follow the court’s instructions.”

The case of *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. Rep. 154, 41 L. E. 528, relied on by counsel merely holds that a charge by the court that jurors should examine the questions involved with candor and with a proper regard and deference to the opinions of each other and decide the case if they could conscientiously do so, is not error, as hereinabove stated. Such an instruction might very properly be given by the court if requested but it certainly had no proper place in the form of a question propounded by counsel on *voir dire* examination.

IV. THE COURT WAS CORRECT IN REFUSING TO GO
INTO THE LEGALITY OF THE ARREST AND
SEIZURE IN THE MINUTES OF THE TRIAL.

The general rule, of course, is that courts in criminal cases will not pause in the midst thereof to determine how the possession of evidence tendered has been obtained. The exception to this rule is where it develops during the trial of the case that evidence introduced therein has been seized in violation of the defendant's constitutional rights. If it becomes probable during the trial of a cause that such an illegal seizure has taken place, then ordinary justice requires that the court pause and inquire more fully into the matter by which the evidence was seized.

Gouled v. U. S., 298 U. S. 313, 65 L. E. 647;
Amos v. U. S., 255 U. S. 314, 65 L. E. 655.

The instant case, however, is plainly not within this exception. The validity of the seizure was determined at the defendants' instance prior to the time of the trial and there is not a particle of testimony in the case tending to show that the liquor was unlawfully seized. On the contrary, the transcript of record is replete with testimony to the contrary.

V. THE CONSPIRACY COUNT.

The portions remaining of defendants' brief which we have not thus far discussed, deal with the sufficiency of the testimony to support the conspiracy count and the court's instructions in regard thereto.

The argument is first that the overt act alleges unlawful *importation* of intoxicating liquor, that the proof submitted to sustain the overt act amounted to transportation only and that the variance is fatal. This is an assumption unwarranted by the text of that portion of the count designated "Overt Acts." The word "transportation" is there used to describe the carrying of the liquor from British Columbia to Stanwood, Washington, and it is plain the *transportation* and *not the importation* of the liquors was relied on by the grand jurors as constituting the overt act.

As counsel suggests, it is elementary that an indictment should be drawn with such particularity as to advise defendants before the trial in plain and certain terms, the charges which they must be prepared to meet. The employment of any other method in the preparation of an indictment might leave the defendants pitifully prejudiced in the presentation

of their case and that is the reason of the rule. But, it is significant to note that no claim of prejudice is here made by reason of the so-called failure of proof; and no prejudice could have resulted by any stretch of the imagination, for defendants were, by the very terms of the indictment notified that the Government would rely on the unlawful transportation from British Columbia to Stanwood, and consequently were prepared to meet the Government's proof as to a part of that journey, viz., from the mouth of the Stillaguamish river to Stanwood. The variance between pleading and proof, if any there was, was not fatal because not prejudicial.

Defendants further fall into error in assuming that the conspiracy count contains an allegation of but one overt act. It is settled that any act, however small, performed pursuant to and to carry out, the object of a conspiracy, may be relied on as an overt act.

Criminal Code (Act March 14, 1909, c. 321)
Sec. 37; 35 Stat. 1096 (Comp. Stat. Sec.
10201)

Plaintiff might have, with propriety, pleaded as overt acts in this case, numberless steps or portions of the journey, which formed together as a whole constituted the unlawful transportation alleged

under the head "Overt Acts." That the pleader has seen fit to combine the numerous overt acts necessarily involved into an allegation of one unlawful transportation, does not alter the fact that fundamentally a series of overt acts are involved. It is settled law that if several overt acts are charged it is not necessary to prove them all.

12 *Corpus Juris* 627; *Jones v. United States*,
179 Fed. 584 (9th C.C.A.)

It is plaintiff's contention, therefore, that the allegation of unlawful transportation of intoxicating liquors from British Columbia to Stanwood, Washington, is in fact and in legal contemplation the allegation of a series of severable and separate overt acts each constituting a component part of the journey as a whole and that any part of said journey or unlawful transportation might be relied on by plaintiff to establish the overt act.

In *United States v. Newton* (D. C.), 52 Fed. 275, the court's oral instructions alone are reported. That was a criminal prosecution for conspiracy to defraud the United States, the overt act alleged being the mailing from Des Moines, in the Southern Division of Iowa, of a large quantity of old newspapers for the purpose of fraudulently increasing the weight of the mail over defendant's post route.

The court there instructed the jury not to take into consideration in support of this overt act certain re-wrapping and re-mailing of these old newspapers at Cainesville, Missouri, by a Mr. Oxford, an alleged co-conspirator. This instruction was correct. The overt act sought to be substituted for the one alleged was performed by a different conspirator in a different district. The act sought to be proved bore no relation to and was not a component part of the overt act alleged, and defendants must have necessarily been prejudiced had the Government been permitted to prove an overt act *not alleged*.

Rabens v. United States, 146 Fed. 978 (4th C.C.A.), is not in point. It holds merely that a conviction on an indictment charging conspiracy to rob a postoffice at Latta, South Carolina, is not supported by testimony that the accused participated in a *general conspiracy* to rob banks and everything that was robable. The law of the Rabens case, *supra*, will not be disputed, but it certainly has no application here, for it is not contended that there was a failure to prove the conspiracy as laid in the charging part of the indictment.

Windsor v. U. S., 286 Fed. 51 (6th C.C.A.)

In the case of *Einziger v. United States*, 276 Fed. 905 (3rd C.C.A.), there was a failure to prove the

charging part of the conspiracy count, viz., "conspiracy to sell" intoxicating liquors. That there is no analogy between that and the instant case is clear, because here the conspiracy was to "import," "possess", and "transport" intoxicating liquor, and the record is replete with testimony showing conspiracy to violate the National Prohibition Act by the two latter methods. That no importation was shown is obviously not material.

The cases of *Naftzger v. United States*, 200 Fed. 494 (8th C.C.A.); *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781, 30 L. E. 849, and similar cases cited on pages 67 to 74 of defendants' brief to the effect that unnecessary averments in an indictment must be proved, are not in point for the reason that in those cases the allegations, though unnecessary to a statement of the offense involved, were of such a nature as to have mislead the defendants, while in the instant case, as heretofore pointed out, no possible prejudice could have resulted to defendants in putting the initial point of transportation in British Columbia. As stated in *Harrison v. United States*, 200 Fed. 662 (6th C.C.A.):

"Upon the question of variance between indictment and proofs, the controlling consideration should be whether the charge was fairly and fully enough stated to apprise defendant of

what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his injury (*Foster v. U. S. [C.C.A. 6] 178 Fed. 165, 171, 101 C.C.A. 485; Bennett v. U. S. [C.C.A. 6] 194 Fed. 630, 632, 114 C. C. A. 402*).

It must in this connection be borne in mind that an indictment under Criminal Code, Section 37, the conspiracy is the gist of the offense and hence the offenses which the defendants conspired to commit need not be stated with the particularity required in charging the offense itself, but only with such particularity as to identify it.

Roulovitch v. United States, 286 Fed. 315
(3rd C.C.A.)

It follows that in pleading an overt act which is no part of the charging portion of the count and cannot be resorted to to aid defects therein (*Roulovitch v. United States, supra*), the Government should not be held to that particularity of pleading necessary when charging a substantive offense, and the only test upon the question of variance between the overt acts alleged and the proof should be *whether the overt acts were fully and fairly enough stated to apprise the defendant of all he must meet*. Applying that test here we find that the defendants

were fully and fairly advised that the Government would rely on the unlawful transportation of the liquor described in the indictment in the defendants' gas boat "Dragon" to a place near Stanwood, Washington, on October 4, 1922, and hence must have come fully prepared to meet the testimony offered by the Government in that regard.

On this point in conclusion, defendants' statement on page 62 of its brief of the question here involved is incorrect in that it assumes that the overt act proved was one not laid in the indictment.

Contention is further made that the court's instructions permitted the jury to find defendants guilty on overt acts not laid in the indictment, and they cite in support thereof the following excerpt from the court's instructions. (Tr. pp. 164, 165; Defendants' Brief, p. 76):

"And then the next is to commit the offense, —the conspiracy to commit in this case the violation of the national prohibition act. And then before that is an offense something must be done by one of the parties to carry forward the conspiracy. It is immaterial what that act is. It might be sailing a boat down stream, or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing. In this case the overt acts charged in the indictment are set forth in that

count; and it is not necessary that the government establish all of the overt acts charged. It is sufficient if they have proved one act that would carry forward the conspiracy."

These instructions are a long way from telling the jury that the overt acts may be established by facts not pleaded under that head in the indictment. The court was merely illustrating to the jury the character of overt acts in general when it said:

"It is immaterial what that act is. It might be sailing a boat down stream or it might be carrying a cargo or the prohibited commodity in a boat. It might be any minor thing."

The court was not charging that those particular acts might be found to be overt acts in *this* case. This is made plain by the court's next sentence:

"In *this* case the overt acts charged in the indictment are set forth in that count; and it is not necessary that the Government establish *all of the overt acts charged*."

Then follows the sentence to which defendants apparently take exception:

"It is sufficient if they have proved one act that would carry forward the conspiracy."

The reference to "one act," construing not this one sentence, but the entire instruction complained of as a whole, is plainly to one of the *overt acts*

charged, and we are at a loss to see how a body of reasonably intelligent men could have been led to put a contrary construction on these words.

As a matter of fact, it would have been an impossibility for the jury to have found, from the proof submitted, evidence of any overt act other than the unlawful transportation to Stanwood alleged in the indictment, the Government's entire case being rested on testimony to that effect alone. Consequently, assuming that the court's instructions would have permitted the jury to consider an overt act not laid in the indictment, the instructions were not prejudicial because the only overt acts the testimony developed were pleaded in the indictment.

It is submitted that the record as a whole shows no reversible error, and that the judgment of the court below should stand affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,

DE WOLFE EMORY,
Assistant United States Attorney,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN ENGLISH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN ENGLISH,

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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

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For Defendant in Error:

JOSEPH C. BURKE, Esq., United States Attorney,

ROBERT CAMARILLO, Esq., Assistant United States Attorney,

HERBERT N. ELLIS, Esq., Assistant United States Attorney,
Federal Building, Los Angeles, California.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

JOHN ENGLISH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to
the Honorable the Judges of the District Court
of the United States for the Southern District
of California, Northern Division, GREET-
ING:

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which
is in said District Court before the Honorable
Oscar A. Trippet, one of you, between John Eng-
lish, the plaintiff in error, and the United States
of America, the defendant in error, a manifest
error hath happened, to the prejudice and great
damage of the said plaintiff in error, as by his
complaint and petition herein appears; and we
being willing that error, if any hath been, should
be duly corrected, and full and speedy justice done
to the parties aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings with all things concerning
the same, to the United States Circuit Court of Ap-
peals for the Ninth Circuit, at the City of San Fran-
cisco, State of California, together with this writ, so
that you have the same at the said City of San
Francisco within thirty days from the date hereof,
in the said Circuit Court of Appeals to be then and
there held, that the record and proceedings afore-
said being then and there inspected, the said Cir-

cuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 8th day of July, A. D. 1922, and in the one hundred and forty-sixth year of the Independence of the United States of America.

Attest: CHAS. N. WILLIAMS,
Clerk of the District Court of the United States
for the Southern District of California,
Northern Division.

Allowed by order made this 8th day of July,
A. D. 1922.

[Seal]

TRIPPET,
Judge of Said District Court.

I hereby certify that a copy of the within writ of error was on the 8th day of July, 1922, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Northern Division, for said Defendants in Error.

CHAS. N. WILLIAMS,
Clerk U. S. District Court, Southern District of
California.

By Murray E. Wire,
Deputy.

[Endorsed]: No. 588. United States Circuit Court of Appeals for the Ninth Circuit. John English, Plaintiff in Error, vs. United States of

America, Defendant in Error. Writ of Error.
Filed Jul. 8, 1922. Chas. N. Williams, Clerk.
Murray E. Wire, Deputy.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

JOHN ENGLISH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America,
to the UNITED STATES OF AMERICA,
and to JOSEPH C. BURKE, United States
Attorney for the Southern District of Cali-
fornia, GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit, at San Francisco,
in the State of California, within thirty days
from the date hereof, pursuant to a writ of error
filed in the clerk's office of the District Court of
the United States for the Southern District of
California, Northern Division, wherein the said
John English is plaintiff in error and the United
States of America is defendant in error, to show
cause, if any there be, why the judgment in said

writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable OSCAR A. TRIPPET, Judge of the District Court of the United States for the Southern District of California, this 8th day of July, A. D. 1922.

TRIPPET,

United States District Judge.

Attest: CHAS. N. WILLIAMS,

Clerk of the United States District Court for the Southern District of California.

Due service and receipt of a copy of the within citation is hereby admitted this 8th day of July, 1922.

JOSEPH C. BURKE,

United States Attorney.

By HERBERT N. ELLIS,

Special Asst. U. S. Atty.

[Endorsed]: No. 588. United States Circuit Court of Appeals for the Ninth Circuit. John English, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jul. 8, 1922. Chas. N. Williams, Clerk. Murray E. Wire, Deputy.

Indictment.

No. _____

Filed _____

Viol: Section 37, Federal Penal Code. Conspiracy to Violate Section 3, Title II of the National Prohibition Act.

In the District Court of the United States, in and for the Southern District of California, Northern Division.

At a stated term of said court, begun and holden at the City of Fresno, County of Fresno, within and for the Northern Division of the Southern District of California, on the second Monday of November, in the year of our Lord one thousand nine hundred and twenty-one:

The Grand Jurors of the United States of America, selected and sworn, within and for the division and district aforesaid, on their oaths present:

That John English, *alias* John Kelly, George A. Spratt and C. A. Burke, whose full and true names, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, hereinafter called the defendants, and various other persons whose names are to the Grand Jurors unknown, on or about the 15th day of December, 1921, at the City of Fresno, County of Fresno, State of California, within the Northern Division of the Southern District of California and within the jurisdiction of the United States and this Honorable Court, did knowingly, willfully, unlawfully, corruptly and feloniously con-

spire, combine, confederate and agree together to commit offenses against the United States, to wit:

(1) That the defendants would sell, at the City of Fresno, County of Fresno, State of California, within the division and district aforesaid, whiskey fit for beverage purposes and containing alcohol in excess of one half of one per cent by volume, and alcohol; contrary to the provisions of Section 3, Title II of the National Prohibition Act of October 28, 1919.

(2) That the defendants would transport for beverage purposes, whiskey and alcohol, in an automobile on the public streets of the City of Fresno, County of Fresno, [1*] State of California, within the division and district aforesaid; contrary to the provisions of Section 3, Title II of the National Prohibition Act of October 28, 1919.

(3) That the defendants would possess whiskey and alcohol fit for beverage purposes, at the City of Fresno, County of Fresno, State of California, within the division and district aforesaid; contrary to the provisions of Section 3, Title II of the National Prohibition Act of October 28, 1919.

And the said conspiracy, confederation, combination and agreement was continuously, throughout all of the times in this indictment mentioned, in operation and existence.

OVERT ACT No. I.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present:

*Page-number appearing at foot of page of original certified Transcript of Record.

That in furtherance of said conspiracy, combination, confederation and agreement, and to accomplish the purpose and effect the object thereof, at the city of Fresno, county of Fresno, State of California, on or about the 15th day of December, 1921, said defendants did sell, to such persons who might thereafter desire to procure same, intoxicating liquor fit for beverage purposes then and there containing in excess of one half of one per cent by volume;

OVERT ACT No. II.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present:

That in furtherance of said conspiracy, combination, confederation and agreement, and to accomplish the purpose and effect the object thereof, at the city of Fresno, county of Fresno, State of California, on or about the 15th day of December, 1921, the said defendant, John English, *alias* John Kelly, delivered to the office of said defendant, C. A. Burke, in the city of Fresno, a case of intoxicating liquor fit for beverage purposes, then and there containing alcohol in excess of one half of one per cent by volume;

OVERT ACT No. III.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: [2]

That in furtherance of said conspiracy, combination, confederation and agreement, and to accomplish the purpose and effect the object thereof, at the city of Fresno, county of Fresno, State of California, on or about the 15th day of December,

1921, said defendant, John English, *alias* John Kelly, transported one case of intoxicating liquor fit for beverage purposes and containing alcohol in excess of one-half of one per cent by volume, over the public streets of the city of Fresno, from the office of said defendant, C. A. Burke, to the home of said defendant George A. Spratt;

OVERT ACT No. IV.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present:

That in furtherance of said conspiracy, combination, confederation and agreement, and to accomplish the purpose and effect the object thereof, at the city of Fresno, county of Fresno, State of California, on or about the 10th day of January, 1922, said defendant, George A. Spratt, sent a telegram addressed to defendant John English at No. 745 Market Street, San Francisco, California, which read, "Can use 10 shares of stock Friday. Spratt."

OVERT ACT No. V.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present:

That in furtherance of said conspiracy, combination, confederation and agreement, and to accomplish the purpose and effect the object thereof, at the city of Fresno, county of Fresno, State of California, on or about the 13th day of January, 1922, the said defendant John English, *alias* John Kelly, drove an automobile, containing intoxicating liquor fit for beverage purposes and containing alcohol in excess of one half of one per cent by volume,

over the streets of the city of Fresno to the home of defendant, George A. Spratt.

OVERT ACT No. VI.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: [3]

That in furtherance of said conspiracy, combination, confederation and agreement, and to accomplish the purpose and effect the object thereof, at the city of Fresno, county of Fresno, State of California, on or about the 13th day of January, 1922, the said defendant, C. A. Burke, went to the home of said defendant, George A. Spratt.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JOSEPH C. BURKE,

United States Attorney.

HERBERT N. ELLIS,

Special Assistant United States Attorney.

[Indorsed]: No. 588. Crim. United States District Court, Southern District of California, Northern Division. The United States of America vs. John English, *alias* John Kelly, George A. Spratt and C. A. Burke. Indictment. Viol. Sec. 37, F. P. C. Conspiracy to Violate Section 3, Title II, Nat'l Pro. Act. A True Bill. George F. Sharpe, Foreman. Filed this 15th Day of March, A. D. 1922. Chas. N. Williams, Clerk. Bail \$1500. [4]

At a stated term, to wit, the May, A. D. 1922, Term of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Fresno, on Monday, the first day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY,
GEORGE A. SPRATT and C. A. BURKE,
Defendants.

Minutes of Court—May 1, 1922—Trial.

This cause coming on for arraignment and plea of defendants John English, *alias* John Kelly; George A. Spratt and C. A. Burke; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; John English being present in court on bond without an attorney; defendant George A. Spratt being present in court with his attorney, R. K. Stewart, and defendant C. A. Burke being present in court with his attorney C. E. Lindsay, Esq., and defendants having been called and arraigned and required to plead, thereupon defendant John English states his name to

be John English and not John Kelly, and interposes his plea of not guilty; and defendant C. A. Burke thereupon waives the reading of the indictment and states his name to be as therein given and interposes his plea of Not Guilty; it is now by the Court ordered that this cause be continued to the hour of two o'clock P. M., for the entry of plea of defendant George A. Spratt; that this cause be set for trial of defendants John English and C. A. Burke for May 8th, 1922, and that the motion of said C. E. Lindsay, Esq., for severance on behalf of said John English and C. A. Burke be denied; and now, at the hour of two o'clock P. M. this cause coming on for the arraignment and plea of defendant George A. Spratt; H. N. Ellis, Esq., appearing as counsel for the Government and defendant George A. Spratt being present in court with his attorney, R. K. Stewart, Esq., and [5] having been arraigned, thereupon waives the reading of the indictment and states his name to be as therein given; and, upon being required to plead, having interposed his plea of Not Guilty, it is by the Court ordered that this cause be continued to May 8th, 1922, for the trial of defendant George A. Spratt. [6]

At a stated term, to wit, the May, A. D. 1922, Term of the District Court of the United States, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Fresno, on Thursday, the 8th day of June, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY,
GEORGE A. SPRATT and C. A. BURKE,
Defendants.

Minutes of Court—June 8, 1922—Trial (Continued).

This cause coming on at this time for trial of defendants herein before a jury to be impanelled; John R. Layng, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; defendant John English being present with his attorney W. C. Burgess, Esq.; defendant George A. Spratt being present with his attorney R. K. Stewart, Esq., and defendant C. A. Burke being present with his attorney C. E. Lindsay, Esq., and Eugene Frankenberger being also present as stenographic reporter of the testimony and pro-

ceedings, and counsel for the respective parties having announced their readiness to proceed with the trial of this cause, it is by the Court ordered that this cause be proceeded with and that a jury be impanelled herein; and thereupon the following twelve names were drawn from the jury-box, to wit:

J. D. Stephens; E. A. Walrond; J. P. Wilkins; T. J. Ockenden; John Bonnar; John W. Gee; E. J. Crawford; F. H. Davis; W. E. Cline; T. A. Barr; G. W. Steward and H. M. Cobbey, and said jurors having been called and sworn on *voir dire* and passed for cause by the Court and by the respective counsel; and

E. J. Crawford having been peremptorily challenged by counsel [7] for the plaintiff and by the Court excused; and

T. A. Barr having been peremptorily challenged by counsel for the defendant and by the Court excused; and

John W. Gee having been peremptorily challenged by counsel for the plaintiff and by the Court excused; and

W. E. Cline having been peremptorily challenged by counsel for the defendant and by the Court excused; and

F. H. Davis having been peremptorily challenged by counsel for the plaintiff and by the Court excused; and

E. A. Walrond having been peremptorily challenged by counsel for the defendant and by the Court excused; and

G. W. Steward having been peremptorily challenged by counsel for the plaintiff and by the Court excused; and

John Bonnar having been peremptorily challenged by counsel for the plaintiff and by the Court excused; and

Thereupon the Court ordered the names of eight more petit jurors drawn from the jury-box, said names being as follows, to wit:

Joseph G. Martin; J. C. Wheeler; R. C. Clark; Eddie G. Theusen; G. C. Drake; Henry Reed; Oscar Puryear and C. L. Adams, and said petit jurors having been called and sworn on *voir dire* and passed for cause by the Court and by counsel for the respective parties hereto; and

Said R. C. Clarke having been peremptorily challenged by counsel for the defendant and by the Court excused; and

Thereupon the Court ordered the name of one more petit juror drawn from the jury-box, said name being W. D. Bowen; and said W. D. Bowen having been called, and sworn on *voir dire* and passed for cause by the Court and by counsel for the respective parties; and

Said W. D. Bowen having been peremptorily challenged by counsel for the defendant and by the Court excused; and

Thereupon the Court ordered the name of one more petit juror drawn from the jury-box, said name being John Shepherd, and said John Shepherd having been called and sworn on *voir dire* and

passed [8] for cause by the Court and by counsel for the respective parties; and

Said John Shepard having been peremptorily challenged by counsel for the defendant and by the Court excused;

Thereupon the Court ordered the name of one more petit juror drawn from the jury-box, said name as drawn being Chas. L. Fink, and said Chas. L. Fink having been called and sworn on *voir dire* and passed for cause by the Court and by counsel for the respective parties; and

Said Chas. L. Fink having been peremptorily challenged by counsel for the plaintiff and by the Court excused;

Thereupon the Court ordered the name of one more petit juror drawn from the jury-box, said name being J. J. Edward and said J. J. Edward having been called and sworn on *voir dire* and passed for cause by the Court and by counsel for the respective parties; and

Said J. J. Edwards having been peremptorily challenged by counsel for the defendant and by the Court excused;

It is by the court ordered that the name of one more petit juror be drawn from the jury-box, said name being T. J. Bone and said T. J. Bone having been called and sworn on *voir dire* and passed for cause by the Court and by counsel for the respective parties hereto, and counsel for the said respective parties not desiring to exercise their right to peremptorily challenge the jurors now in the box, it is by the Court ordered that said petit jurors be

sworn in a body as the jury to try this cause, said jurors being as follows, to wit:

THE JURY.

- | | |
|----------------------|----------------------|
| 1. J. D. Stephens, | 7. Eddie G. Theusen, |
| 2. J. P. Wilkins, | 8. Henry Reed, |
| 3. T. J. Ockenden, | 9. Oscar Puryear, |
| 4. H. M. Coffey, | 10. C. L. Adams, |
| 5. Joseph G. Martin, | 11. G. C. Drake, |
| 6. J. C. Wheeler, | 12. Thos. J. Bone, |

And Miss D. D. Simpson having been called and sworn, and said C. E. Lindsay having objected to the introduction of [9] of any evidence and said objection having been overruled and said witness having thereupon testified in behalf of the Government; and

Now, at the hour of 11:26 o'clock A. M., the Court admonishes the jury that during the progress of this trial they are not to speak to anyone about this cause or any matter or thing therewith connected, and that until said cause is finally submitted to them for their deliberation under the instruction of the Court they are not to speak to each other about this cause or any matter or thing therewith connected or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess for eight minutes; and

Now, at the hour of 11:34 o'clock A. M., the Court having reconvened and all being present as before and it being noted that the jury is present; and

Geo. B. Parker having been called, sworn and having testified in behalf of the Government; and

Now, at the hour of 11:58 o'clock A. M. the Court gives to the jury the aforementioned admonition and declares a recess to the hour of two o'clock P. M., and

Now, at the hour of two o'clock P. M. the Court having reconvened and all being present as before and it being noted that the jury is all present; and H. N. Ellis, Esq., Assistant U. S. Attorney, being also present as counsel for the Government; and

Geo. B. Parker having resumed the stand and testified further in behalf of the Government; and

In connection with his testimony it is by the Court ordered upon motion of counsel for the Government, that the following exhibit be admitted for Identification, to wit,

U. S. Ex. No. 1 for Identification—Telegram dated January 11, 1922, signed Spratt; and

Sheldon Hunter having been called, sworn and having testified in behalf of the Government; and
[10]

Miss D. D. Simpson having been recalled and having testified in behalf of the Government;

It is by the Court ordered, upon motion of counsel for the Government, that the following exhibit be admitted for Identification, to wit:

U. S. Ex. No. 2 for Identification—Bottle and contents bearing No. 6304; and

Byron White having been called, sworn and having testified in behalf of the Government,

It is by the Court ordered, upon motion of counsel for the Government, that the U. S. Ex. No. 1 heretofore offered and admitted for Identification

be admitted in evidence, said exhibit being as follows, to wit:

U. S. Ex. No. 1—Telegram to John English signed by Spratt and dated January 11th, 1922; and

Lulu Johnston having been called, sworn and having testified in behalf of the Government, it is by the Court ordered, upon motion of counsel for the Government, that the U. S. Ex. No. 2 heretofore offered and admitted for Identification be admitted in evidence, said exhibit being as follows, to wit:

U. S. Ex. No. 2—Bottle and contents;

And it is by the Court further ordered, upon motion of John R. Layng, Esq., attorney as aforesaid, that the following exhibit be admitted for Identification, to wit:

U. S. Ex. No. 3 for Identification — Bottle and contents labelled "Old Darling"; and

Geo. P. Parker having been recalled and having testified further in behalf of the Government; and

In connection with his testimony H. N. Ellis, Esq.; Assistant United States Attorney, reads to the jury paragraphs marked A and B of an affidavit of defendant Spratt, said paragraphs on motion of said H. N. Ellis, Esq., Assistant U. S. Attorney, being admitted [11] in evidence and marked United States Exhibit 4, said affidavit being dated January 18, 1922, Fresno, California; and

T. J. Nicely having been called, sworn and having testified in behalf of the Government,

It is by the Court ordered that the following exhibit be admitted in evidence for the Government on motion of H. N. Ellis, Esq., attorney as aforesaid:

U. S. Ex. No. 5—Certificate of Registration of Essex Car, in name John English; and

Thereupon the Court admonishes the jury that during the progress of this trial they are not to speak to anyone about this cause or any matter or thing therewith connected, and that until said cause is finally submitted to them for their deliberation under the instruction of the Court they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess for five minutes; and

Now, at the expiration of five minutes the Court having reconvened and all being present as before; and

T. J. Nicely, heretofore sworn, resumes the stand and testifies further in behalf of the Government; and

In connection with his testimony, it is by the Court ordered, upon motion of Asst. United States Attorney H. N. Ellis, Esq., that the following exhibits be admitted in evidence on behalf of the Government, to wit:

U. S. Ex. No. 6—Bottle and contents.

U. S. Ex. No. 7.—Three basket containers of bottles and contents.

Thereupon the Government rests except as to proof as to receipt of telegram; and

C. E. Lindsay having renewed his motion to strike,

It is by the Court ordered at the hour of 3:58 o'clock P. M. [12] that the jury herein be excused to the hour of ten o'clock A. M., June 9th, 1922, the jury having received the aforementioned admonition, and thereupon this Court declares a recess in this cause to said date. [13]

At a stated term, to wit, the May Term, A. D. 1922, of the District Court of the United States, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Fresno, on Friday, the 9th day of June, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY, GEORGE
A. SPRATT and C. A. BURKE,

Defendants.

**Minutes of Court — June 9, 1922 — Trial
(Continued).**

This cause coming on at this time for further trial of defendants herein; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; defendants John English, *alias* John Kelly, George A. Spratt and C. A. Burke being present in court with their Attorneys C. E. Lindsay, Esq.; R. K. Stewart, Esq., and W. C. Burgess, and counsel for the respective parties having announced their readiness to proceed with the trial of this cause, it is by the Court ordered that this cause be proceeded with; and

Thereupon said H. N. Ellis, Esq., having reviewed certain evidence at the request of the court and

Court having thereupon entered an order herein for the dismissal as to defendant C. A. Burke; and

Shelden Hunter, a witness heretofore sworn, resumes the stand; and

Thereupon the Government and defendants having rested; and

At the hour of 10:25 o'clock A. M. H. N. Ellis, Esq., having argued to the jury on behalf of the Government; and

At the hour of 10:30 o'clock A. M. W. C. Burgess having argued in behalf of defendant John English; and [14]

At the hour of 10:40 o'clock A. M. R. K. Stewart, Esq., having argued in behalf of defendant George A. Spratt; and

Said H. N. Ellis, Esq., having argued in rebuttal on behalf of the Government at the hour of 10:45 o'clock A. M.; and

At the hour of 10:55 o'clock A. M. the Court having instructed the jury with respect to the law involved in this cause and Geo. Hudson having been sworn as bailiff to care for the jury herein during the deliberation of its verdict; and

Now, at the hour of 11:45 o'clock A. M. the jury return into the courtroom and are asked by the clerk of the Court if they have agreed upon a verdict and the jury, through their foreman, having replied that they have so agreed, are required to present the same, said verdict as presented being as follows, to wit:

In the District Court of the United States, Southern
District of California, Northern Division.

588—CRIM.

UNITED STATES OF AMERICA

vs.

JOHN ENGLISH, *alias* JOHN KELLEY and
GEORGE A. SPRATT.

We, the jury in the above-entitled cause, find the defendant John English guilty as charged in the indictment and we the jury in the above-entitled cause find the defendant George A. Spratt guilty as charged in the indictment.

Fresno, California, June 9th, 1922.

J. C. WHEELER,

Foreman.

and the verdict of guilty as to defendant John English, *alias* John Kelley and George A. Spratt having been presented, read by the clerk, and ordered filed and entered herein; it is by the Court ordered that the jurors herein be excused subject to call; that U. S. Ex. No. 3 for Identification and U. S. Exhibits Nos. 2 and 6 be held by the Prohibition Officer and that U. S. Ex. No. 7 be destroyed by the U. S. Marshal; and

At the hour of two o'clock P. M. W. C. Burgess, Esq., having made a motion for a new trial on behalf of John English, said motion is overruled by the Court and an exception noted to the overruling on behalf of the defendant and said W. C. Burgess, having thereupon made a motion for arrest of judgment as to defendant John English, it is by the Court ordered that said motion be overruled and the court now pronounces sentence upon defendants John English and George A. Spratt for the offence of which they stand convicted, [15] namely, Viol. Section 37, Federal Penal Code. Conspiracy to violate Section 3, Title II of the National Prohibition Act, and it is the judgment of the Court that John English stand committed to the United States Penitentiary at McNeil Island for the term and period of twelve months and one day and that defendant George A. Spratt stand committed to the said United States Penitentiary at McNeil Island for the term and period of two years and pay unto the United States of America a fine in the sum of \$1000.00 and stand committed to the said penitentiary until said fine is paid or defendant is dis-

charged according to law, sentence for failure to pay the \$1000.00 fine not to commence to run until the expiration of two years sentence, and it is further ordered by the Court that the two years term of imprisonment in this cause begin to run immediately and be concurrent with the sentence imposed against said defendant George A. Spratt in cause No. 593—Crim.

5/317-318. [16]

In the District Court of the United States, Southern District of California, Northern Division.

588—CRIM.

UNITED STATES OF AMERICA

vs.

JOHN ENGLISH, *alias* JOHN KELLY and
GEORGE A. SPRATT.

We, the jury in the above-entitled cause, find the defendant John English ——— guilty as charged in the indictment, and we, the jury in the above-entitled cause, find the defendant George A. Spratt ——— guilty as charged in the indictment.

J. C. WHEELER,

Foreman.

Fresno, California, June 9, 1922.

Filed Jun. 9, 1922. Chas. N. Williams, Clerk.
Louis J. Somers, Deputy. [17]

In the District Court of the United States in and
for the Southern District of California, North-
ern Division.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY, GEORGE
A. SPRATT and C. A. BURKE,

Defendants.

Clerk's Certificate to Judgment-roll.

I, Chas. N. Williams, clerk of the District Court
of the United States, for the Southern District of
California, do hereby certify the foregoing to be
a full, true and correct copy of an original Judg-
ment entered in the above-entitled cause; and I do
further certify that the papers hereto annexed con-
stitute the judgment-roll in said cause.

Attest my hand and seal of said District Court
this 14th day of June, A. D. 1922.

[Seal]

CHAS. N. WILLIAMS,

Clerk.

By Louis J. Somers,

Deputy Clerk.

[Indorsed]: No. 588—Crim. In the District
Court of the United States for the Southern District
of California, Northern Division. United States of
America, Plaintiff, vs. John English *alias* John
Kelly, George A. Spratt and C. A. *Burk*, Defend-
ants. Judgment-roll. As to all defts. Filed June

14, 1922. Chas. N. Williams, Clerk. By Louis J. Somers, Deputy Clerk. Recorded Min. Book No. 5, Pages 317-318. [18]

In the District Court of the United States in and
for the Southern District of California,
Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY, GEORGE
A. SPRATT and C. A. BURKE,

Defendants.

Petition for Writ of Error.

Comes now John English, one of the defendants herein, and by this, his petition for a writ of error herein, says that on the 9th day of June, 1922, the above-entitled court rendered and entered judgment herein in favor of the said plaintiff and against said defendant John English, wherein the said Court adjudged the said defendant guilty of the crime charged in the indictment herein and that he, the said defendant, be imprisoned in the penitentiary for the period of one year and one day.

Your petitioner further shows that in said judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice and great damage of this defendant, all of which will more fully appear from the assignment of errors filed with this petition.

WHEREFORE, said defendant, John English, prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and for the reversal of said judgment, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco in said Circuit, and that an order be [19] made fixing the amount of the bail bond herein which shall operate as a supersedeas bond herein and entitle said defendant to be at large pending the determination of said writ of error.

W. C. BURGESS,

Attorney for Defendant, John English.

The writ of error prayed for in the foregoing petition is allowed as by order made this 8th day of July, 1922.

TRIPPET,

Judge of the District Court of the United States
for the Southern District of California.

[Indorsed]: 588. U. S. District Court, Southern District of California, Northern Division. United States of America, Plaintiff, vs. John English, *alias* John Kelly et als., Defendants. Petition for Writ of Error. Filed Jul. 8, 1922. Chas. N. Williams, Clerk. By Murray E. Wire, Deputy Clerk. Law Offices of W. C. Burgess, Crocker Building, San Francisco, California, Attorneys for Defendant. [20]

In the District Court of the United States for the
Southern District of California, Northern
Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY, GEORGE
A. SPRATT, and C. A. BURKE,

Defendants.

Order Fixing Amount of Bond on Writ of Error.

Now, on this 8th day of July, 1922, the above-entitled cause coming on regularly to be heard on the petition of the above-named defendant John English praying that a writ of error may issue herein to review the judgment entered herein, and for the correction of errors in the proceedings had prior thereunto in this cause, and praying that an order be made fixing the amount of the bail bond herein which defendant John English shall give and furnish upon said writ of error, which shall operate as a supersedeas bond herein and shall entitle said defendant John English to be at large pending the determination of said writ of error, and said defendant having filed herein and presented to the Court his said petition, and therewith an assignment of errors relied upon and intended to be urged by him on said writ of error; and it appearing to the Court that said defendant is entitled to said writ of error and to said order, now, on motion of W. C. Burgess, attorney for said defendant,—

IT IS ORDERED that upon defendant John English entering into and giving a bail bond for the amount and conditioned as hereinafter mentioned, a writ of error as prayed for herein is allowed and granted, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit at the city [21] of San Francisco, California, in said Circuit; and,

IT IS FURTHER ORDERED, that upon the said defendant John English filing with the Clerk of this Court a good and sufficient bail bond, to be approved by this Court, in the sum of Five Thousand Dollars (\$5,000.00), conditioned as required by law, that all further proceedings in this court be and they are hereby suspended and stayed, and said defendant John English shall thereupon be entitled to be at large on said bail pending the determination of said writ of error.

TRIPPET,

Judge.

Dated July 8th, 1922.

[Indorsed]: 588. U. S. District Court, Southern District of California, Northern Division. U. S. of America, Plaintiff, vs. John English, etc., et als., Defendants. Order Fixing Supersedeas Bond. Filed Jul. 8, 1922, at——min. past——o'clock—M. Chas. N. Williams, Clerk. By Murray E. Wire, Deputy Clerk. Law Offices of W. C. Burgess, Crocker Building, San Francisco, California, Attorneys for———. [22]

In the District Court of the United States for the
Southern District of California, Northern Di-
vision.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY,
GEORGE A. SPRATT, C. A. BURKE,
Defendants.

Assignment of Errors.

Comes now John English, one of the defendants in the above-entitled cause and makes and files with his petition for writ of error herein the following assignment of errors, which, he avers, occurred upon the trial of the above-entitled cause and in the proceedings had and taken therein, and which he will assert and rely upon in the presentation of his said writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, to wit,—

I.

The said Court erred in overruling the defendants' motion that no evidence be received in said cause on the ground that the indictment does not state a public offence, nor does it state any offense in contravention of any of the laws of the United States, and it does not state a crime as defined by any statute of the United States, to which said ruling the defendant duly excepted.

II.

The Court erred in overruling defendants' objection to the introduction of evidence of a conversation between witness D. D. Simpson and George A. Spratt, one of the above-named defendants, and erred in admitting said conversation in evidence, said objection being on the ground that said conversation was [23] immaterial, irrelevant and incompetent, the proper foundation has not been laid, there has been no evidence offered to prove or tending to prove the charge alleged in the indictment, to wit, the charge of conspiracy, that as to the defendants Burke and English it is hearsay, and that it did not take place during the course of any conspiracy alleged in the indictment.

That the witness testified over the objection of defendant as follows:

That the conversation took place about the 9th or 10th of January, that she and Agent Parker told Spratt that they wanted to buy some bonded whiskey, that Spratt told them he could sell it in ten case lots for \$125.00 a case; also, alcohol at \$10.00 a gallon; that he knew a man in San Francisco with 300 cases of bonded whiskey; that witness and Parker ordered 10 cases of whiskey and 10 gallons of alcohol from Spratt; to be delivered January 13, 1922. That Spratt did not mention the name of the party in San Francisco, and the conversation was on January 9th.

That the defendant duly excepted to the ruling of the Court.

III.

That the Court erred in overruling the defendants' objection to the admission as evidence of a conversation had between witness D. D. Simpson and George A. Spratt, had on January 13th, and in admitting said conversation as evidence, said objection being on the same grounds as set forth in paragraph II hereof, to which ruling defendant duly excepted. Said testimony so admitted over the objection of defendant is as follows:

He (meaning George A. Spratt) told me that a load of liquor was on the highway. He asked Mr. Parker if he had the money to pay for it. We were to pay for it when delivered. I told him Mr. Parker had the money. He said, "Well, can I depend on you to be here at 7:30 o'clock." I said we would both be there. Spratt said he would go out on the highway and tell the man to come in.

[24]

IV.

The Court erred in admitting over the objection of defendant evidence of the witness D. D. Simpson of a conversation had with the defendant George A. Spratt on January 13, 1922, to which ruling defendant duly excepted, and which conversation was as follows,

He (meaning Spratt) told me that the man was waiting out on the highway with this load of liquor and he wanted to know if Mr. Parker had the money to pay for it and if he could depend on Mr. Parker and myself being present at 631 "O" Street, that it would be delivered at 7:30 P. M.

Burke came in a few minutes later and I spoke to him about a taxi bill I owed and got some money from Mr. Parker to pay him.

Said objection was on the same grounds as set forth in paragraph II hereof.

V.

The Court erred in overruling defendants' objections to the following question and in admitting as evidence the answer of the witness D. D. Simpson, said objection being on the same grounds as set forth in paragraph II hereof.

Q. Anything else?

A. I saw the defendant English there that night about ten minutes after Burke came in. The agents brought him in.

Defendant duly excepted to said ruling.

VI.

The Court erred in overruling defendants' objection to the following testimony and in admitting the same as evidence in said cause, to which ruling the defendant duly excepted:

Q. Did you see any liquor on the premises that night when defendants Spratt, Burke and English were there?

Mr. LINDSAY.—I object to that as immaterial and irrelevant, not tending to prove any of the charges in the indictment, not tending to prove the conspiracy charge, and not tending to prove any of the overt acts charged in the indictment. [25]

The COURT.—Objection overruled.

Mr. LINDSAY.—Exception.

The witness then testified over the objection of defendant;

Yes, I did. It was in a dish-pan, in the room occupied by Mr. Spratt. They were one-fifth gallon bottles labeled "Old Taylor." I saw the defendant English on the night of January 13th. I never saw him any other time before that.

VII.

The Court erred in admitting as evidence over the objection of defendant, to which ruling defendant duly excepted, the evidence of George V. Parker as to a conversation between himself and defendant George A. Spratt, had on January 5th or 6th. The witness had testified that he first saw the defendant English on January 13th, and that he had had a conversation with Spratt the first night they met, January 5th or 6th.

Q. What was the conversation that you had with Mr. Spratt there?

Mr. LINDSAY.—I object to that as immaterial, irrelevant and incompetent, not within the issues, the proper foundation has not been laid, and there has been no evidence offered here proving or tending to prove conspiracy as alleged in the indictment, and this objection is made on behalf of all of the defendants, and on behalf of the defendants Burke and English I also object on the ground that as to them and each of them, particularly, as hearsay.

The COURT.—I will reserve my ruling.

The WITNESS.—Spratt said he could supply liquor in any amount, any kind of liquor.

VIII.

The Court erred in admitting over the objection of defendant, evidence of the witness Parker as to another conversation as follows: [26]

Q. Did you have a conversation with Spratt the next day at 4 o'clock? A. We did.

Q. I will ask you to state the conversation you had.

Mr. LINDSAY.—Same objection as before, if your Honor please.

The COURT.—Ruling reserved as to English and Burke. Overruled as to Spratt.

Mr. LINDSAY.—Exception.

The witness then testified that Agent Simpson had asked Spratt if he could supply liquor and that Spratt answered yes, and asked how much they wanted and that they told him ten cases, and that Spratt said it was bonded liquor. That they also ordered ten gallons of alcohol. That the conversation was on the 9th. That the conversations were both prior and subsequent to the 13th of January; that English was first mentioned subsequent to the 13th of January when Spratt made a statement as to his dealings with Burke and English on matters that transpired in December, 1921. This was after the raid had been made.

IX.

The witness was then asked to give the conversation made in *in* the presence of the Federal officials and referred to as a statement. Defendants ob-

jected thereto and the Court sustained the objection as to English and Burke and overruled it as to Spratt. The following proceedings were then had.

Mr. LINDSAY.—If your Honor please, may I make one more objection that has occurred to me? I understand that the testimony has been declared by your Honor to be irrelevant as to the defendants Burke and English, and my objection has been sustained as to those defendants.

The COURT.—Yes.

Mr. LINDSAY.—That is the ruling. Then I state that it is irrelevant for all purposes; unless it relates to more than one of the defendants it must be irrelevant. Unless more than one [27] of the alleged conspirators is to be bound by the testimony it must be irrelevant to the single conspirator.

The COURT.—Objection overruled.

Mr. LINDSAY.—Exception.

The witness then testified over said objection that Spratt said he had secured the liquor he sold during the month of December from John English, that Burke had introduced them, that Burke had advanced Spratt the money to purchase the liquor, that it had been delivered at Spratt's house and was the liquor sold to the Federal agents during the month of December. That Spratt was asked where he had secured this load of liquor and he said he sent a telegram of John English in San Francisco reading, "Can use ten shares of stock Friday night," and that English brought the liquor down there. That Spratt continued and told how

he had first met English and secured liquor from him; that English told him that he could supply the liquor at \$115.00 a case.

During the testimony it was admitted by the United States Attorney and so held by the Court that this conversation would not bind the defendants Burke and English, but only bind Spratt.

X.

The witness was then called on to identify a telegram as being in the handwriting of Spratt and testified that he had seen Spratt sign his name about 20 times.

The testimony was objected to as immaterial and irrelevant and on the ground that the witness had not qualified to answer the question.

The objection was overruled and the witness testified that the signature was George Spratt's.

XI.

Sheldon Hunter was then sworn and testified that he was the [28] Fresno manager of the Western Union. He was shown the telegram. He testified that he had never seen it until he got it out of the office files of the Western Union. He was asked if the telegram had been sent.

Mr. LINDSAY.—I object to that as immaterial, irrelevant and incompetent, hearsay, and on the further ground that there has been no evidence here of any conspiracy, therefore evidence as to any overt act alleged in the indictment is irrelevant.

The Court overruled the objection and the defendants except.

The witness then testified over said objection that the telegram had transmission marks on it that the operator had sent it.

XII.

The Government then offered a bottle of liquid, identified by the witness Simpson as one she purchased on the 20th day of December at 631 "O" Street, at Spratt's house.

It was objected to by defendants as immaterial, irrelevant and incompetent, not one of the overt acts alleged in the indictment, and not any act in pursuance of the alleged conspiracy.

The objection was overruled and the defendants excepted.

XIII.

The Court erred in admitting as evidence the testimony of the Witness Simpson (recalled) as a conversation relating to the purchase of liquor from defendant Spratt and one Lulu Johnston on the 20th day of December, 1921. The proceedings were as follows:

Q. What was said about the purchase of this liquor by you to either of these defendants, or what was said by any of the defendants concerning it, at the time?

The defendants objected to the same as immaterial, irrelevant and incompetent, hearsay, and not within the issues, and no foundation laid.

The COURT.—Objection overruled except as to the defendant [29] English; as to him I will take it under advisement.

Mr. LINDSAY.—Exception.

The witness then testified over said objection,—We said to Lulu Johnston and George Spratt in the presence of Burke that we wanted to buy a bottle of whiskey and Lulu Johnston and George Spratt said it was genuine whiskey and they invited us to have a drink out of another bottle labelled the same. This was about 9 o'clock P. M. I bought the whiskey from Johnston and Spratt and the money was given to Johnston by Agent Emerick.

Mr. LINDSAY.—I do not understand, if your Honor please, that this Johnston person is accused of being one of these conspirators. We are certainly not bound by anything that was done by this lady in either procuring whiskey with the Johnston person or buying whiskey.

Mr. ELLIS.—She said, your Honor, and I think without question, that she bought it from Spratt and this Johnston woman. They were there at the house together.

The COURT.—Wait a minute. This indictment charges a conspiracy between these three defendants and various other persons to the Grand Jurors unknown. Johnston may have been one of those in the conspiracy. I will overrule the objection.

Mr. LINDSAY.—Exception.

Mr. ELLIS.—I only wanted it for counsel. She said she bought it from Spratt. That is all I wanted to develop. That will be satisfactory.

Mr. LINDSAY.—None of it is satisfactory. We have objected to all of it as far as that is concerned.

XIV.

The Court erred in admitting the testimony of Byron White concerning a telegram as follows:

Witness testified that he was with the Western Union Telegraph Company in Fresno. He was shown the telegram marked United [30] States Exhibit No. 1 for identification, and continued,

I believe I accepted it across the counter; I do not know the defendant Spratt, I do not know him as the person from whom I received the telegram.

The telegram was then offered in evidence.

Mr. LINDSAY.—I object to it as irrelevant, immaterial and incompetent, has not been identified nor in any manner connected with any defendant in this case, not a part of the case, not within the issues.

The COURT.—A witness testified that was the defendant Spratt's signature, as I remember it.

Mr. ELLIS.—It is.

Mr. LINDSAY.—That is the extent of it. No proof that it was ever sent or received.

The COURT.—That is for argument to the jury. I will overrule the objection.

To which ruling the defendants duly excepted. The telegram was then, over said objection, admitted in evidence.

XV.

The Court erred in admitting the testimony of the witness Johnston as to a conversation between agents Simpson and Parker and the defendant Spratt during the week preceding the raid on January 13th, concerning liquor, defendants ob-

jected to said testimony on the ground that it was immaterial, irrelevant and incompetent, not within the issues, and hearsay as to the defendants English and Burke.

The COURT.—As to Burke and English, it will be taken under advisement, overruled as to Spratt.

Mr. LINDSAY.—Exception.

Over said objection witness testified that they were still trying to get liquor, but did not remember whether they said anything about how it was to be procured. Spratt said he [31] thought he could get it. She saw English there the night of the 13th when he was brought in by the officers. Did not hear any conversation about a telegram. Simpson told me to ask Spratt if he had ordered the liquor. He said that he had.

XVI.

The Court erred in admitting over defendant's objection a bottle of liquor marked United States Exhibit No. 2 for identification.

The evidence was objected to by defendant as immaterial, irrelevant and incompetent, has not been identified, and not within the issues of this case.

The objection was overruled and the defendant duly excepted.

The bottle of liquid was then admitted over said objection and marked United States Exhibit No. 2.

XVII.

The case was duly submitted to the jury and the jury found the defendants English and Spratt guilty as charged in the indictment.

The defendant John English thereupon made his motion for a new trial on the grounds that the verdict is not supported by the evidence, that the verdict is against the evidence, errors of law committed at the trial and the admission of evidence over the objection of the defendant English.

The Court denied the motion and the defendant duly excepted.

XVIII.

The defendant John English then made his motion in arrest of judgment on the ground that the indictment does not state an *an* offense against the laws of the United States; there is no evidence of any overt act introduced in support of the allegations of conspiracy, and errors of law committed at the trial.

The Court denied the motion and the defendant duly excepted. [32]

WHEREFORE, the defendant John English prays that the judgment heretofore rendered and entered in this cause may be reversed and held for naught, and that the indictment herein and each of the counts thereof be dismissed, and that the defendant John English have such other and further relief as may be in conformity with the law and practice of this Court.

W. C. BURGESS,

Attorney for Defendant, John English.

[Indorsed]: #588. United States District Court, Southern District of California, Northern Division. United States of America, Plaintiff, vs. John Eng-

lish, etc., et als. Assignment of Errors. Filed Jul. 8, 1922. Chas. N. Williams, Clerk. By Murray E. Wire, Deputy Clerk. Law Offices of W. C. Burgess, Crocker Building, San Francisco, California, Attorneys for ————. [33]

In the District Court of the United States, for the
Southern District of California, Northern
Division.

No. 588—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY, GEORGE
A. SPRATT, C. A. BURKE,

Defendants.

**Engrossed Bill of Exceptions of Defendant John
English.**

BE IT REMEMBERED that this cause was brought on for trial at the May term of said court, at the courtroom, in the Postoffice Building, in the city of Fresno, in said district, on the 8th day of June, 1922, before the Court, Hon. Oscar A. Trippet, District Judge, presiding, and a jury, Herbert H. Ellis, Esq., and John R. Layng, Esq., Assistant United States Attorneys, appearing for the plaintiff, and W. C. Burgess, Esq., appearing for the defendant John English.

And the case being called for trial, the plaintiff, to maintain the issue on its part, called as a witness,

D. D. Simpson, who was duly sworn, and testified that her name was D. D. Simpson.

EXCEPTION No. 1.

Whereupon the defendants, by their counsel, moved that no evidence be received in the cause on the ground that the indictment [34] does not state a public offense, nor does it state any offense in contravention of any of the laws of the United States, and that it does not state a crime as defined by any statute of the United States.

The Court overruled the objection and an exception was taken on behalf of all of the defendants.

Testimony of D. D. Simpson, for the Government.

The witness then proceeded to testify that she was a Federal Prohibition Agent, and knew defendants Spratt, Burke and English; that on or about the 9th or 10th of January, this year, at 631 "O" Street, Fresno, she had a conversation with Spratt relative to the purchase of whiskey; that this occurred in the presence of Lulu Johnston and Special Agent Parker.

EXCEPTION No. 2.

Q. I will ask you to state what was said.

Mr. LINDSAY.—I object to that, if your Honor please, as immaterial, irrelevant and incompetent, the proper foundation has not been laid; there has been no evidence offered to prove or tending to prove the charge alleged in the indictment, to wit, the charge of conspiracy, and I also object on behalf of the defendants Burke and English, on the ground that as to them that is hearsay.

(Testimony of D. D. Simpson.)

The COURT.—Well, of course, what Spratt said will not be binding on English and Burke unless the conspiracy existed at that time. The practice is, generally, to show some evidence of conspiracy.

Mr. LAYNG.—Of course, we cannot prove that all at once, if your Honor please.

The COURT.—Any statements made—

Mr. LAYNG.—It would not be binding upon the other parties unless we connect it up. Of course, we cannot connect it up all at once. [35]

Discussion.

Mr. LINDSAY.—An additional objection occurs to me that it does not appear that this conversation took place during the course of any conspiracy alleged in the indictment.

The COURT.—The conversation, of course, must be had after the conspiracy was formed, and the conversation must have occurred in furtherance of the conspiracy.

Discussion.

The COURT.—All right. I will overrule the objection. Answer the question.

Mr. LINDSAY.—Note an exception.

The COURT.—I will reserve my ruling as to English and Burke. Overruled as to Spratt.

The witness then proceeded to testify that she and Special Agent Parker told Spratt that they wanted to buy some bonded whiskey; that Spratt said he could sell it in ten case lots at \$125.00 a case; also, alcohol at \$10.00 a gallon; that he knew a man in San Francisco with 300 cases of bonded whiskey;

(Testimony of D. D. Simpson.)

that witness and Parker ordered 10 cases of whiskey and 10 gallons of alcohol from Spratt, to be delivered January 13, 1922. That Mr. Spratt did not mention the name of the party in San Francisco. That the conversation was on January 9th. That she saw the three defendants, Spratt, Burke and English on January 13th, 1922, at 631 "O" Street, Fresno, California. She saw Spratt before 7 o'clock; that she and Spratt left the house together.

EXCEPTION No. 3.

Mr. LAYNG.—What did Mr. Spratt tell you at that time?

Mr. LINDSAY.—Same objection as to the former question.

The COURT.—What was this date?

Mr. LAYNG.—This was on the 13th. [36]

The COURT.—January 13th. The ruling will be reserved as to English and Burke. Overruled as to Spratt.

Mr. LINDSAY.—Exception.

The witness then testified over the objection of defendants as follows:

He told me that the load of liquor was on the highway. He asked me if Mr. Parker had the money to pay for it. We were to pay for it when delivered. I told him Mr. Parker did have it. "Well," he said "can I depend on you to be here at 7:30 o'clock?" I said, "Yes, we would both be there." Mr. Spratt said he would go out on the highway and inform the man to come in. Mr.

(Testimony of D. D. Simpson.)

Spratt drove me down to the Hotel Ray. We had a conversation on the way.

EXCEPTION No. 4.

Mr. LAYNG.—I will ask you to detail the conversation.

Mr. LINDSAY.—I don't like to take up the time of the Court in making objections but I object on the same grounds.

The COURT.—What date was this?

The WITNESS.—That was on January 13th.

The COURT.—The same day. The same course of procedure.

Mr. LINDSAY.—Exception.

The witness then testified over the objection of defendant as follows:

He told me that the man was waiting out on the highway with this load of liquor and he wanted to know if Mr. Parker had the money to pay for it and if he could depend on Mr. Parker and myself being at 631 "O" Street, that they would deliver it at 7:30. I returned to the house about 7:30. Mr. Burke came in a few minutes later. I spoke to him about a taxi bill and got some money from Mr. Parker to pay him for the trip from which I had just returned. [37]

Mr. Spratt came to the door to my room and said the liquor was there.

EXCEPTION No. 5.

Q. Anything else?

Mr. LINDSAY.—I object to anything Mr. Spratt might have said at that time as being immaterial

(Testimony of D. D. Simpson.)

and irrelevant, and on the other grounds I have heretofore advanced.

The COURT.—Was this still on the 13th?

The WITNESS.—Yes, sir.

The ruling will be reserved as to English and Burke. Overruled as to Spratt.

The witness continued: I saw the defendant English, he gave his name as John Kelly, there that night, about ten minutes after Burke came in. The agents brought him in.

EXCEPTION No. 6.

Q. Did you see any liquor on the premises that night when the defendants Spratt, Burke and English were there?

Mr. LINDSAY.—I object to that as immaterial and irrelevant, not tending to prove any of the charges in the indictment, not tending to prove the conspiracy charge, and not tending to prove any of the overt acts charged in the indictment.

The COURT.—Objection overruled.

Mr. LINDSAY.—Exception.

The witness then testified over the objection of defendant:

Yes, I did. It was in a dish-pan, in the room occupied by Mr. Spratt. They were one-fifth gallon bottles labeled "Old Taylor." I first met the defendant Burke about December 19, 1921, but did not see him again until after January 3d, 1922. I saw him between the 3d and the 13th possibly six times at 631 O Street. [38] I did not have any conversations with him relative to liquor.

(Testimony of D. D. Simpson.)

Mr. LAYNG.—Did you see the defendant English at 631 O Street at any other time than the 13th of January?

A. No, just on the night of the 13th.

Q. Did you ever see Mr. English before that time?

A. No, I don't believe so.

EXCEPTION No. 7.

Testimony of George V. Parker, for the Government.

The Government then called GEORGE V. PARKER as a witness in its behalf. He was duly sworn and testified as follows:

My name is George V. Parker. I am Special Agent, Bureau of Internal Revenue. I arrived in Fresno either January 5th or 6th. I know the defendants Spratt, Burke and English; I first met Spratt January 8th at 631 O Street; I first met defendant Burke on the night of my arrival; I first saw the defendant English at 631 O Street on January 13th; I had a conversation with Spratt relative to liquor the first night I met him.

Mr. LAYNG.—What was the conversation that you had with Spratt there?

Mr. LINDSAY.—I object to that as immaterial, irrelevant, incompetent, not within the issues, the proper foundation has not been laid, and there has been no evidence offered here proving or tending to prove conspiracy as alleged in the indictment, and this objection is made on behalf of all of the defendants, and on behalf of the defendants Burke

(Testimony of George V. Parker.)

and English I also object on the grounds that as to them and each of them, particularly, as hearsay.

The COURT.—I will reserve my ruling. What is the date now?

The WITNESS.—This was January 8th.

Mr. LAYNG.—Now state the conversation.

The WITNESS.—Spratt said, in the presence of Lulu Johnstone and D. D. Simpson, that he could supply liquor in any amount, [39] any kind of liquor.

EXCEPTION No. 8.

Q. Did you have a conversation with Spratt the next day at 4:00 o'clock? A. We did.

Q. I will ask you to state the conversation you had.

Mr. LINDSAY.—Same objection as before, if your Honor please.

The COURT.—Ruling reserved as to English and Burke. Overruled as to Spratt.

Mr. LINDSAY.—Exception.

The witness then testified over the objection of defendants that Agent Simpson asked Spratt if he could supply liquor and Spratt answered "yes," and asked us what kind of liquor we wanted and how much; told him about ten cases and asked him if it was bonded liquor. He said "Yes" and said he could supply alcohol. This was on the 9th. The substance of the conversation was that he would sell us ten cases of whiskey and ten gallons of alcohol. Prior to and subsequent to January 13th I had a conversation with Spratt relative to what hap-

(Testimony of George V. Parker.)

pened in December; English and Burke were first mentioned in this regard subsequent to January 13th, a few days after, he made a statement at 631 O Street, one in the United States Attorney's office and one in the County Jail. He made a statement on January 13th relative to his dealings with Burke and English, on matters that transpired in December, 1921, in the presence of Agent Simpson, Federal Director Mitchell, Special Agent Oftadel and myself. This was after the raid and Mr. Spratt was in custody, but no papers had been served.

EXCEPTION No. 9.

The prosecuting attorney having asked the witness to give [40] the conversation defendants objected as follows:

Mr. LINDSAY.—Now, I object on behalf of the defendants Burke and English on the ground that it is irrelevant and immaterial, not within the issues, hearsay, and—

The COURT.—That is sufficient, it seems to me. The conspiracy must have ended then, Mr. Layng. Spratt could not say anything that would bind the other defendants.

Mr. LAYNG.—No, it would bind himself.

The COURT.—It will be sustained as to Burke and English, overruled as to Spratt.

The WITNESS.—Do you want the conversation relative to these two men only?

Mr. LAYNG.—Yes.

The COURT.—State the whole conversation that occurred there.

(Testimony of George V. Parker.)

The WITNESS.—It was no conversation, Spratt was given an opportunity to make a statement. He stated his connection with 631 O Street and concerning the sale of liquor.

EXCEPTION No. 10.

Mr. LINDSAY.—If your Honor please, may I make one more objection that has occurred to me? I understand that the testimony has been declared by your Honor to be irrelevant as to the defendants Burke and English, and my objection has been sustained as to those defendants.

The COURT.—Yes.

Mr. LINDSAY.—That is the ruling. Then I state that it is irrelevant for all purposes; unless it relates to more than one of the defendants it must be irrelevant. Unless more than one of the alleged conspirators is to be bound by the testimony it must be irrelevant to the single conspirator. [41]

The COURT.—Objection overruled.

Mr. LINDSAY.—Exception.

The witness then proceeded to testify over the objection of defendants as follows:

The WITNESS.—I believe Mr. Oftadal, Special Agent in charge, asked Spratt where he had secured the liquor that he had sold during that week and during the month of December. He said the liquor he sold was a case of liquor he secured from—I don't know whether he mentioned the name of Kelly or English—it was John Kelly. He said he was introduced to Kelly by Burke and Burke stated that Kelly had—Spratt said that Burke

(Testimony of George V. Parker.)

had told him that English had a case of whiskey and wanted to sell it; that Spratt did not have the money and Burke paid for the whiskey, and Spratt either brought the liquor to his house or had it delivered; I don't remember, and that was the liquor that Spratt and Lulu Johnston sold to Federal Agents during month of December, one quart or one bottle of that liquor. When he was asked where this load of liquor had been secured Spratt said that he sent a telegram to John English on Market Street in San Francisco, reading, "Can use ten shares of stock Friday night." Friday was the 13th. English brought the liquor down there, first stopping at the house of Burke, where he unloaded a case.

Mr. LINDSAY.—In regard to that, do I understand that, do I understand that the witness now is relating what Spratt said?

The WITNESS.—Yes, sir. He unloaded a case of liquor at Burke's house that night, then Burke preceded him to 631 O Street.

The witness continued to testify concerning the same conversation or statement of Spratt after his arrest.

Spratt told how he first met English and secured liquor from him. [42]

The witness being asked for any conversation that occurred defendants objected on the same grounds as before, and the following proceedings were had.

The COURT.—When was this conversation?

(Testimony of George V. Parker.)

The WITNESS.—January 13th.

Mr. ELLIS.—At the time of the arrest.

Mr. LINDSAY.—After the arrest.

The COURT.—That wouldn't bind anybody but Spratt.

Mr. ELLIS.—Oh, no, certainly.

The COURT.—The conspiracy was over at that time, undoubtedly.

Mr. ELLIS.—Yes, that is true.

The COURT.—Then he can't make any statement to bind the other defendants.

Mr. ELLIS.—We are not seeking to bind the other defendants.

The COURT.—You did not so state. Proceed.

The witness then proceeded to testify to his conversation with Spratt:

Spratt stated that he first met English in December, 1921, at the Pioneer Bar in Fresno; that he bought a case of whiskey from English with Burke's money, and Burke was to have part of the whiskey, but whenever Burke took any of the whiskey Spratt was to be given credit for that amount of money; that English told him that he could supply him with liquor at \$115.00 a case. Spratt never told me much about his liquor handling prior to the raid, but he told me he could get liquor from a man in San Francisco, that he would send for it and have it here Friday night.

The witness continued: I was there Friday night. I saw only one bottle of liquor there Friday night. It was in the pocket of Mr. English. [43]

(Testimony of George V. Parker.)

Burke arrived about five minutes before. Agent Simpson said "Spratt says the liquor is here," and right then the raid took place. I saw a dish pan with some bottles of liquor brought in. Burke and I were in the dining-room. Spratt and Simpson went to the rear of the house. Agents Hunt and DeSpain entered with a search-warrant. In a few minutes Spratt and English were brought in. A bottle was found in English's pocket. I marked this bottle myself. There were eight or ten bottles in the dish-pan. The bottle taken from English was the same size as those in the dish-pan, one-fifth gallon, but I do not remember whether it was labelled the same or not. I do not remember the name on the bottle. All of the bottles were stamped.

EXCEPTION No. 11.

The witness continued: I am familiar with the signature of Mr. Spratt and with his handwriting. Since the 13th of January Spratt has signed his name in my presence, I should imagine, twenty times, and looking over the records of the revenue office I have seen his signature innumerable times, as well as his handwriting. His signature is peculiar.

Q. I show you a telegram here written in pencil and ask you if you know in whose handwriting it is. A. The signature, yes.

Q. Whose signature is that?

A. George Spratt's.

MR. LINDSAY.—I *object that* as immaterial and

(Testimony of Sheldon Hunter.)

irrelevant. The witness has not shown that he is qualified to answer the question that I know of.

The COURT.—Objection overruled. [44]

EXCEPTION No. 12.

Testimony of Sheldon Hunter, for the Government.

SHELDON HUNTER was then sworn on behalf of the Government and testified that he was the manager of the Western Union, Fresno, California, and was the custodian of the office records there. His attention was called to the telegram mentioned by Parker and the following proceedings were had.

Q. (By Mr. ELLIS.) Where did you ever see that before.

A. Not until I got it out of the files.

Q. What?

A. Not until I got it out of the files. Not until I had it removed from the files.

Q. From what files?

A. Our message files.

Q. Whose message files?

A. The Western Union Telegraph Company.

Q. Calling your attention to it, are you able, by examination of that document or from any other record in your office and your knowledge of the business of the office, able to state whether that is a telegram that was sent by the Western Union Company? A. Yes.

Q. Was it sent?

(Testimony of D. D. Simpson.)

Mr. LINDSAY.—I object to that as immaterial, irrelevant, incompetent, hearsay, and on the further ground that there has been no evidence here of any conspiracy; therefore, evidence as to any overt act alleged in the indictment is irrelevant.

The COURT.—Objection overruled.

Mr. LINDSAY.—Exception.

The WITNESS.—It has transmission marks on it that the operator has transmitted it. [45]

The witness then testified that the private mark of the operator indicated that night operator Rudin was the operator on duty. That the second sheet attached to the telegram was a service message indicating that the message was not delivered at the first attempt. It was originally addressed 745 Market Street.

EXCEPTION No. 13.

**Testimony of D. D. Simpson, for the Government
(Recalled).**

Witness SIMPSON was then recalled by the Government and the following proceedings were had:

Q. I show you a bottle here and ask you if you have seen that before?

A. Yes. On the 20th day of December, 1921, at 631 O Street, Fresno, where Mr. Spratt lives. I kept it with me until the 21st day of December, then I took it to San Francisco, to the State Prohibition Director Mitchell; it was in his safe until May; I took it to the United States Chemist

(Testimony of D. D. Simpson.)

for analysis, and the chemist shipped it to me in Fresno, and since that time it has been in the storeroom in this building. I purchased the bottle.

Q. From whom.

Mr. LINDSAY.—I object to that as immaterial, irrelevant and incompetent; not one of the overt acts alleged in the indictment and cannot possibly be any act in pursuance of the alleged conspiracy.

Mr. ELLIS.—A circumstance in the case and there is evidence in the case to show the conspiracy then, and it is the liquor we are dealing with; we allege they were dealing with.

Mr. LINDSAY.—You are alleging a particular conspiracy that was formed at a particular time.

The COURT.—Formed the 15th day of December, and alleged to have continued in existence to and including the return of the indictment. Objection overruled.

Mr. LINDSAY.—Exception. [46]

The witness then testified that Spratt, Burke, Gunn, Johnston, and Agents Rinckel and Emerick were present when the purchase was made.

EXCEPTION No. 14.

Q. What was said about the purchase of this liquor by you to either of these defendants, or what was said by any of the defendants concerning it, at the time?

Mr. LINDSAY.—I object to that as immaterial, irrelevant and incompetent, hearsay, and not within the issues, and no foundation laid.

(Testimony of D. D. Simpson.)

The COURT.—Exception overruled except as to the defendant English; as to him I will take it under advisement.

EXCEPTION No. 15.

The witness then testified over the said objection: We said to Lulu Johnston and George Spratt in the presence of Burke that we wanted to buy a bottle of whiskey and Lulu Johnston and George Spratt said it was genuine whiskey and they invited us to have a drink out of another bottle labelled the same. This was about 9 o'clock P. M. I bought the whiskey from Johnstone and Spratt and the money was given to Johnston by Agent Emerick.

Mr. LINDSAY.—I do not understand, if your Honor please, that this Johnston person is accused as being of these conspirators. We are certainly not bound by anything that was done by this lady in either procuring whiskey with the Johnston person, or buying whiskey. Is it a man, or woman?

A. Yes, sir.

Mr. LINDSAY.—Or buying from her.

Mr. ELLIS.—She said, your Honor, and I think without question, that she bought it from Spratt and this Johnston woman. [47] They were there at the place together.

The COURT.—Wait a minute. This indictment charges a conspiracy between these three defendants and various other persons to the Grand Jurors unknown. Johnston may have been one of those in the conspiracy. I will overrule the objection.

(Testimony of Byron White.)

Mr. LINDSAY.—Exception.

Mr. ELLIS.—I only wanted it for counsel. She said she bought it from Spratt. That is all I wanted to develop. That will be satisfactory.

Mr. LINDSAY.—None of it is satisfactory. We have objected to all of it as far as that is concerned.

EXCEPTION No. 16.

Testimony of Byron White, for the Government.

BYRON WHITE was then sworn on behalf of the Government and testified that he was with the Western Union Telegraph Company in Fresno. He was shown United States Exhibit No. 1 for identification (the telegram) and continued:

I believe I accepted this across the counter at the Western Union, at 9:15 P. M., January 11, 1922. I do not know the defendant Spratt; do not know him as the person from whom I received the telegram; it is part of the records of the office.

Mr. Ellis then offered the telegram in evidence.

Mr. LINDSAY.—I object to it as irrelevant, immaterial and incompetent, has not been identified nor in any manner connected with any defendant in the case, not a part of the case, not within the issues.

The COURT.—A witness testified that was the defendant Spratt's signature as I remember it.

Mr. ELLIS.—It is.

Mr. LINDSAY.—That is the extent of it. No proof that it was ever sent or received.

(Testimony of Lulu Johnston.)

The COURT.—That is for argument to the jury. I will [48] overrule the objection.

Mr. LINDSAY.—Exception.

The telegram was admitted as evidence and marked United States Exhibit No. 1.

The witness then testified that he sent the message to the operating-room by tube.

EXCEPTION No. 17.

Testimony of Lulu Johnston, for the Government.

LULU JOHNSTON was then sworn on behalf of the Government and was shown United States Exhibit No. 2 for identification (a bottle) and asked if she had ever seen it before. She testified that she had seen one like it when Simpson was at her place, that a man took it away, she did not know who he was; that it was brought to the house with several other bottles by Spratt.

Q. How many.

Mr. LINDSAY.—I object to that as immaterial, irrelevant, incompetent, not part of the conspiracy alleged in the indictment.

Mr. ELLIS.—One of the overt acts is that a case was delivered to Spratt's house by this defendant Burke.

The COURT.—Objection overruled.

Mr. LINDSAY.—I further object on the part of the defendant Burke that whatever the defendant Spratt may have done would not be binding on him in the present stage of the testimony.

(Testimony of Lulu Johnston.)

The COURT.—I will reserve my ruling as to him.

Mr. LINDSAY.—And English also?

The COURT.—Yes, sir. I might submit the whole matter to the jury under instructions.

The witness then testified that there were 12 bottles brought to the house, all filled, and that one was sold to Simpson. That for about a week, Spratt, Simpson and Parker talked about liquor. Witness was then asked for the gist of the conversation with Spratt about liquor. [49]

Mr. LINDSAY.—I interpose the same objection heretofore interposed, immaterial, irrelevant, incompetent, not within the issues, and hearsay as to the defendants English and Burke.

The COURT.—As to Burke and English it will be taken under advisement; overruled as to Spratt.

Mr. LINDSAY.—Exception.

The witness then testified that they were still trying to get the liquor, one so much, the other so much, to get it all together and deliver it to suit themselves. Witness did not remember whether anything was said as to how it was to be procured. Spratt said he thought he could get it, do not remember if he said where. Saw Burke there on the night of the 13th. Saw English brought in by the officers. She did not hear any conversation about a telegram or a message. Simpson told me to ask Spratt if he had ordered the liquor. He said he had.

(Testimony of Lulu Johnston.)

EXCEPTION No. 18.

Mr. Ellis then offered in evidence United States Exhibit No. 2 (a bottle) for identification.

Mr. LINDSAY.—I object to that as immaterial, irrelevant, incompetent, has not been identified, and not within the issues of this case.

The COURT.—Overruled.

Mr. LINDSAY.—Exception.

The bottle was received in evidence and marked United States Exhibit No. 2.

I saw a very large dish-pan full of bottles, about the size of exhibit No. 2, of liquor which one of the officers brought into the house the night of the raid; the bottles were wrapped in paper; defendants Burke and English were there at that time.

The witness Parker was then recalled by the plaintiff. [50]

He identified a certain written instrument as having been read and signed in his presence by George A. Spratt.

Mr. ELLIS.—I offer paragraph two and the last paragraph of the affidavit, signed by Mr. Spratt.

Mr. LINDSAY.—I object to it as immaterial, irrelevant, incompetent, not within the issues, and not binding on the defendant Burke or the defendant English.

The COURT.—Objection sustained as to English and Burke.

Mr. ELLIS.—I offer this paragraph 4. I will mark it paragraph A and paragraph B.

Thereupon a portion of an affidavit marked A and B signed by defendant Spratt was received in evidence as United States Exhibit No. 4; said exhibit reads as follows:

“On or about December 15, 1921, I ordered a case of ‘Old Crow’ whiskey from John English, *alias* Jack Kelley, which he delivered to me on that day. I first met English in the Pioneer Bar, where he gave me a drink. That was along about December 15, 1921. Later C. A. Burke called me over the phone and asked me to come to his office. When I arrived at Burke’s office English was there and offered me some more of the whiskey. After drinking it he asked me if I could handle some of it. I asked him how much it was and he made a price of \$115.00 per case. I told him that I could not pay that much, but would like to get a bottle. He refused to sell less than a case, and after talking it over with Burke, I took a case, Burke agreeing to let me have the money to make the purchase. It was understood that it was to be taken to my house and as Burke wanted a bottle he was to come down and get it. He was to give me credit for whatever he took under this arrangement.”

Paragraph B reads:

“After the dinner party on this day, and after Judge Irving had departed from the house, I had a long conversation with D. D. Simpson, then known to me as Irene Conlan,

(Testimony of T. J. Nicely.)

and George Parker, now know to me as a Special Agent of the Bureau of Internal Revenue. During this conversation arrangements were made whereby I was to act as an agent in the securing of ten cases of whiskey and ten gallons of alcohol. This liquor was to be secured from John English, *alias* Jack Kelley, and to secure same I wired to San Francisco to John English, 745 Market Street, such telegram reading as follows:

‘Can use ten shares of stock Friday’ and signed ‘Spratt.’

It was previously agreed between English and myself that in case I ordered whiskey I was to send a telegram reading in that way.”

[51]

Mr. LINDSAY.—To which I object on the ground that it is incompetent, immaterial, and irrelevant, not within the issues and not binding on the defendants English or Burke, or either of them, in any manner.

The COURT.—Objection sustained as to English and Burke.

Testimony of T. J. Nicely, for the Government.

T. J. NICELY was called and sworn on behalf of the plaintiff and testified that he was a Federal Prohibition Agent, that the collection of bottles shown him was taken by him from an Essex Roadster car in the garage at the rear of 631 “O” Street; that he saw Burke, Spratt and English there; that

(Testimony of T. J. Nicely.)

there was a certificate of registration on the car; identified the certificate; saw it first in the car on the 13th of January.

The certificate was then offered and received in evidence by the Government as a document found in the car in which the liquor was found on the premises of Spratt.

The objection of defendants to the evidence was sustained as to Burke but was overruled as to Spratt and English.

The certificate was marked Government's Exhibit No. 5, which showed that the said Essex car was registered in the name of the defendant, John English, with the Motor Vehicle Department of the State of California.

Witness identified one of the bottles shown him as one taken from the said Essex car. It was offered in evidence as United States Exhibit No. 6

Mr. LINDSAY.—Objected to as incompetent, immaterial, irrelevant, not within the issues; there has been no evidence of any conspiracy as alleged in the indictment. I also object on behalf of the defendant Burke that the testimony is not in any way binding on him. [52]

The COURT.—Objection overruled as to all defendants.

Mr. LINDSAY.—Exception.

The bottle was received and marked Exhibit No. 6. Concerning Exhibit No. 6 witness Nicely testified that its alcoholic content was fifty-five per cent by volume and that it was in the same condition as

(Testimony of T. J. Nicely.)

when taken from the said Essex car on January 13, 1922.

EXCEPTION No. 19.

Mr. ELLIS.—I offer these bottles in evidence, your Honor.

Mr. LINDSAY.—I object to the introduction as immaterial, irrelevant, incompetent, no evidence here of any conspiracy, and I particularly object as far as the defendant Burke is concerned that there is no testimony binding upon him in the present stage of the testimony.

The COURT.—Objection overruled.

Mr. LINDSAY.—Exception.

The bottles were received and marked United States Exhibit No. 7. Said exhibit consisted of 184 bottles of alcoholic liquor which had been found in and moved from the said Essex car by the witness. Witness further testified that before and after removing said bottles from said automobile he saw defendants Spratt, Burke and English at No. 631 "O" Street on the night of January 13, 1922.

The plaintiff, reserving the right to introduce evidence of the delivery of the telegram, rested.

Mr. Lindsay, on behalf of the defendants, moved the Court to strike out all the testimony which has been received as to overt acts alleged in the indictment on the ground that there has been absolutely no evidence here of any conspiracy, only evidence of alleged overt acts. [53]

Mr. Ellis argued the case for the plaintiff.

(Testimony of Sheldon Hunter.)

The COURT.—Well, the case against Burke will be dismissed.

**Testimony of Sheldon Hunter, for the Government
(Recalled).**

SHELDON HUNTER was recalled by Government and testified:

That he had the office records with him; that he had a water copy of the message as received from Fresno addressed to John English, 745 Market Street, care of Golden Rule, San Francisco, reading "Need ten shares of stock Friday," signed "Spratt." The message left Fresno at 9:15 routed 9:28; notice left 9:30; returned 9:41; sent out a second time at 10:06 delivered at 10:10 to a man named H. Hahn. That investigation showed that H. Hahn had been an employee of the Golden Rule at that time, that he had left there several months ago, and his present location was unknown.

That there was no part of the record that showed that John English had ever received the telegram. It was thereupon stipulated that the telegram United States Exhibit No. 1, was sent from Fresno to San Francisco.

Both sides rested.

The Court then instructed the jury.

The jury retired and returned to court with a verdict finding the defendants John English and George A. Spratt guilty as charged in the indictment.

EXCEPTION No. 20.

Mr. BURGESS.—If your Honor please, I make a motion for a new trial on behalf of the defendant on the ground that the verdict is not supported by the evidence, the verdict is against the evidence, errors of law committed at the trial; and the admission of evidence over the objection of the defendant English.

The COURT.—The motion will be overruled.
[54]

Mr. BURGESS.—I also make a motion for the arrest of judgment on the ground that the indictment does not state an offense against the laws of the United States, there is no evidence of any overt act introduced in support of the allegations of conspiracy, and errors of law committed at the trial.

The COURT.—Motion overruled.

Mr. BURGESS.—Exception to both rulings, please. [55]

In the District Court of the United States, for the
Southern District of California, Northern
Division.

No. 588—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY,
GEORGE A. SPRATT, C. A. BURKE,
Defendants.

Order Settling Engrossed Bill of Exceptions.

And now at this time the above-entitled cause coming on to be heard upon settlement of the engrossed bill of exceptions herein, and the Court being willing that if any error hath been committed the same be corrected, and that speedy justice be done the defendant herein, the Court does hereby certify that the foregoing engrossed bill of exceptions contains all of the testimony offered and admitted upon trial of said cause in support of the charge of conspiracy and the overt acts alleged in the indictment herein; and it also contains all of the testimony and material facts relative to and illustrative of the foregoing exceptions, and it also contains the objections made to all of said testimony and the rulings of the Court thereon and the exceptions taken thereto, and it also contains all of the matters had and done and proceedings taken relative to the matters contained in said bill [56] of exceptions; and it also contains all of the motions made by said defendant during the trial of said cause and the rulings of the court thereon and the exceptions taken thereto, all of which said exceptions were duly allowed; and all of the proceedings relative and pertaining to said motions; that said engrossed bill of exceptions was prepared and submitted within the time allowed by law and the order of the Court, and is now signed, sealed and settled as and for the engrossed bill of exceptions in said cause, and the same is hereby ordered to be

made part of the record on writ of error in said cause.

IN WITNESS WHEEOF, I have hereunto set my hand and the official seal of said court this 27th day of January, 1923.

TRIPPET,
United States District Judge.

[Endorsed]: No. 588—Criminal. In the District Court of the United States, for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. John English et al., Defendants. Engrossed Bill of Exceptions of Defendant, John English, and Order Settling Engrossed Bill of Exceptions. Filed Jan. 31, 1923, at — min. past — o'clock. M. Chas. N. Williams, Clerk. By Murray E. Wire, Deputy. Thomas & Sullivan, Attorneys at Law, Humboldt Bank Building, San Francisco. Telephone Sutter 752. [57]

In the District Court of the United States in and for the Southern District of California, Northern Division.

No. —.

UNITED STATES OF AMERICA

vs.

JOHN ENGLISH, *alias* JOHN KELLY, GEORGE
SPRATT, et al.,

Defendants.

Stipulation Re Bill of Exceptions.

It is hereby stipulated and agreed that the time for filing his draft of his proposed bill of exceptions by the defendant, John English, is extended for the period of ten days from June 19, 1922.

Dated June 19th, 1922.

JOSEPH C. BURKE,
United States Attorney.

W. C. BURGESS,
Attorney for Defendant, John English.

It is so ordered—6-19-22.

TRIPPET,
Judge.

[Indorsed]: No. 588—Cr. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. John English, *alias* John Kelly, George Spratt, et al., Defendant. Stipulation. Filed Jun. 19, 1922, at — min. past — o'clock — M. Chas. N. Williams, Clerk. By Louis J. Somers, Deputy. [58]

At a stated term, to wit, the May Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Thursday, the 6th day of July, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE A. SPRATT et al.,

Defendants.

**Minutes of Court—July 6, 1922—Order Extending
Time Fifteen Days to File Bill of Exceptions.**

Upon *ex parte* motion of John R. Layng, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, it is by the Court ordered that defendant herein be granted a fifteen day stay of execution of sentence to serve and file proposed amendments to bill of exceptions. [59]

At a stated term, to wit, the November Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Fresno on Saturday the 11th day of November, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH et al.,

Defendants.

Minutes of Court—November 11, 1922—Order Extending Time Thirty Days to File Bill of Exceptions.

On the telegraphic request of M. A. Thomas, Esq., and with the consent of Mac Meader, Esq., Assistant United States Attorney, it is now hereby ordered that the May Term, A. D. 1922, be and the same hereby is extended thirty (30) days for the purpose of settling the bill of exceptions of the defendant John English herein, and for making all motions necessary to be made within the term.
[60]

At a stated term, to wit, the November Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Fresno, on Friday, the 8th day of December, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias*, etc., et al.,

Defendants.

Minutes of Court—December 8, 1922—Order Extending Time Thirty Days to File Bill of Exceptions.

A request having been made for an extension of time within which to file the bill of exceptions in this cause, having been received; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, and not opposing said request for extension, the Court thereupon granted said request for extension of 30 days from date hereof, within which to settle bill of exceptions and also to make all or any necessary motions or orders that may be made within the term. [61]

At a stated term, to wit, the November Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Friday, the 5th day of January, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias*, etc.,

Defendant.

Minutes of Court—January 5, 1923—Order Extending Time Fifteen Days to File Bill of Exceptions.

A request having been made for an extension of time within which to file the bill of exceptions in this cause, having been received; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, and not opposing said request for extension, the Court thereupon granted said request for extension of fifteen (15) days from date hereof, within which to settle bill of exceptions and also to make all or any necessary motions or orders that may be made within the term. [62]

At a stated term, to wit, the November Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles on Monday, the 22d day of January, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH,

Defendant.

Minutes of Court—January 22, 1923—Order Extending Time One Day to File Bill of Exceptions.

Good cause appearing therefor, it is by the Court ordered that the time to file proposed bill of exceptions be extended for one day. [63]

At a stated term, to wit, the November Term, A. D. 1922, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles on Tuesday, the 23d day of January, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH,

Defendant.

Minutes of Court—January 23, 1923—Order Extending Time Five Days to File Bill of Exceptions.

At the request of H. N. Ellis, Esq., Assistant U. S. Attorney and on motion of Mark L. Herron,

Esq., Assistant United States Attorney, it is by the Court ordered that the time be extended for five days to file proposed bill of exceptions herein.
[64]

In the District Court of the United States, for the
Southern District of California, Northern
Division.

No. 588—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH, *alias* JOHN KELLY, GEORGE
A. SPRATT, C. A. BURKE,

Defendants.

Praeceptum for Transcript on Writ of Error.

To the Clerk of said Court:

Sir: Please prepare and forward to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit the following record on writ of error in the above-entitled matter:

1. The indictment;
2. Plea of defendant English;
3. Minutes of the trial;
4. The verdict;
5. Petition for writ of error;
6. Assignment of errors;
7. Writ of error;
8. Order fixing bond on writ of error;
9. Citation;

10. Bill of exceptions with order settling same;
11. Orders extending time within which to file and settle bill of exceptions;
12. Authentication of record; [65].
13. Praecipe for transcript on writ of error.

Dated April 19, 1923.

M. A. THOMAS,

CHAS. C. SULLIVAN,

Attorneys for John English, Plaintiff in Error.

[Indorsed]: No. 588—Criminal. In the District Court of the United States, for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. John English, etc., et al., Defendants. Praecipe for Transcript on Writ of Error. Received copy of within praecipe for transcript on April 23, 1923. Herbert N. Ellis, Special Asst. U. S. Atty. Filed Apr. 23, 1923. Chas. N. Williams, Clerk. By Chas. V. Rude, Deputy Clerk. Thomas & Sullivan, Attorneys at Law, Humboldt Bank Building, San Francisco. Telephone Sutter 752. [66]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 66 pages, numbered from 1 to 66 inclusive, to be the transcript of record on writ of error in the above-entitled cause as prepared by the plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me, and contains a full, true, and correct copy of the judgment-roll, petition for writ of error, order fixing amount of bond on writ of error, assignment of errors, engrossed bill of exceptions, stipulation extending time to file bill of exceptions and minute orders extending time to file bill of exceptions, and praecipe for transcript on writ of error. Said record also contains the original citation and original writ of error.

I DO FURTHER CERTIFY that the fees of the clerk for comparing and correcting the foregoing record on writ of error amount to \$18.65, and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this first day of May, in the year of our Lord one [67] thousand nine hundred and twenty-three, and of

our Independence the one hundred and forty-seventh.

[Seal]

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.

By R. S. Zimmerman,
Deputy Clerk. [68]

[Endorsed]: No. 4024. United States Circuit
Court of Appeals for the Ninth Circuit. John Eng-
lish, Plaintiff in Error, vs. The United States of
America, Defendant in Error. Transcript of Rec-
ord. Upon Writ of Error to the United States
District Court of the Southern District of Califor-
nia, Southern Division.

Filed May 7, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4024.

JOHN ENGLISH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to and Including May 7,
1923, to File Record and Docket Cause.**

Upon the application of M. A. Thomas, representing W. C. Burgess, attorney of record for the plaintiff in error herein, and good cause therefor appearing, it is ORDERED that the time within which the above-named plaintiff in error may file the record and docket cause in the above-entitled cause herein be, and the same is, extended and enlarged to and including the 7th day of May, 1923.

Dated April 21, 1923.

W. H. HUNT,

Circuit Judge.

[Endorsed]: No. 4024. In the United States Circuit Court of Appeals for the Ninth Circuit. John English, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Enlarging Time Within Which to File Record and Docket Cause. Filed Apr. 21, 1923. F. D. Monekton, Clerk. Refiled May 7, 1923. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

10. Bill of exceptions with order settling same;
11. Orders extending time within which to file and settle bill of exceptions;
12. Authentication of record; [65] .
13. Praeceptum for transcript on writ of error.

Dated April 19, 1923.

M. A. THOMAS,

CHAS. C. SULLIVAN,

Attorneys for John English, Plaintiff in Error.

[Indorsed]: No. 588—Criminal. In the District Court of the United States, for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. John English, etc., et al., Defendants. Praeceptum for Transcript on Writ of Error. Received copy of within praecipe for transcript on April 23, 1923. Herbert N. Ellis, Special Asst. U. S. Atty. Filed Apr. 23, 1923. Chas. N. Williams, Clerk. By Chas. V. Rude, Deputy Clerk. Thomas & Sullivan, Attorneys at Law, Humboldt Bank Building, San Francisco. Telephone Sutter 752. [66]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 588—CRIM.—N. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN ENGLISH,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 66 pages, numbered from 1 to 66 inclusive, to be the transcript of record on writ of error in the above-entitled cause as prepared by the plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me, and contains a full, true, and correct copy of the judgment-roll, petition for writ of error, order fixing amount of bond on writ of error, assignment of errors, engrossed bill of exceptions, stipulation extending time to file bill of exceptions and minute orders extending time to file bill of exceptions, and praecipe for transcript on writ of error. Said record also contains the original citation and original writ of error.

I DO FURTHER CERTIFY that the fees of the clerk for comparing and correcting the foregoing record on writ of error amount to \$18.65, and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this first day of May, in the year of our Lord one [67] thousand nine hundred and twenty-three, and of

our Independence the one hundred and forty-seventh.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.

By R. S. Zimmerman,
Deputy Clerk. [68]

[Endorsed]: No. 4024. United States Circuit
Court of Appeals for the Ninth Circuit. John Eng-
lish, Plaintiff in Error, vs. The United States of
America, Defendant in Error. Transcript of Rec-
ord. Upon Writ of Error to the United States
District Court of the Southern District of Califor-
nia, Southern Division.

Filed May 7, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4024.

JOHN ENGLISH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to and Including May 7,
1923, to File Record and Docket Cause.**

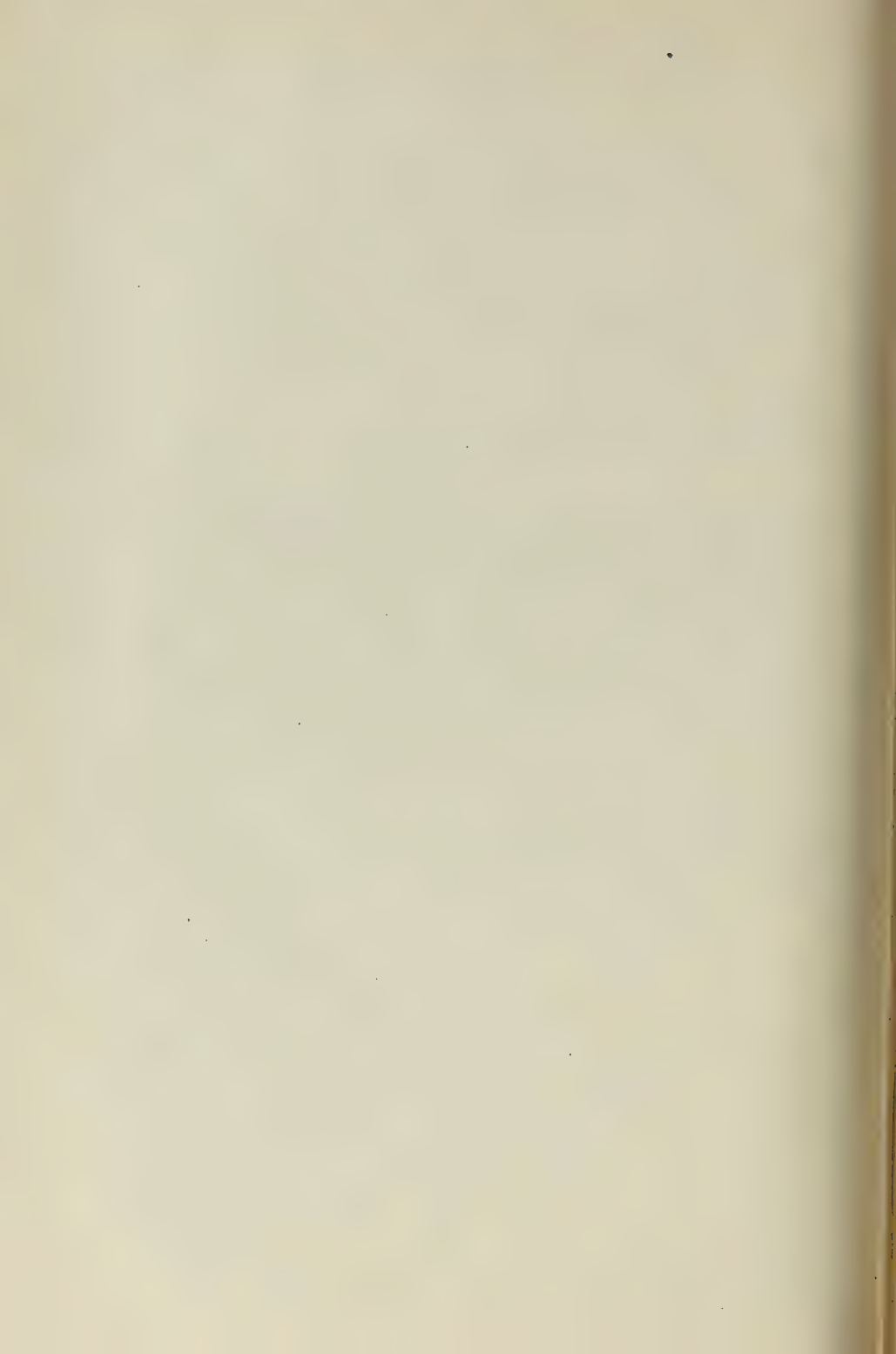
Upon the application of M. A. Thomas, representing W. C. Burgess, attorney of record for the plaintiff in error herein, and good cause therefor appearing, it is ORDERED that the time within which the above-named plaintiff in error may file the record and docket cause in the above-entitled cause herein be, and the same is, extended and enlarged to and including the 7th day of May, 1923.

Dated April 21, 1923.

W. H. HUNT,

Circuit Judge.

[Endorsed]: No. 4024. In the United States Circuit Court of Appeals for the Ninth Circuit. John English, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Enlarging Time Within Which to File Record and Docket Cause. Filed Apr. 21, 1923. F. D. Monckton, Clerk. Refiled May 7, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.



No. 4024

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN ENGLISH,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

M. A. THOMAS,

CHAS. C. SULLIVAN,

Attorneys for Plaintiff in Error.



No. 4024

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN ENGLISH,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case arises on a writ of error from the District Court of the United States for the southern district of California, northern division, upon a verdict and judgment thereon under which the plaintiff in error, John English, was convicted and sentenced for conspiring with one Spratt, one Burke, and others unknown to the grand jury, to violate the national prohibition act (1) by selling at Fresno, Fresno County, California, whisky fit for beverage purposes and containing alcohol in excess of one-half of one per cent by volume; (2) by transferring for beverage purposes whisky and alcohol in an automobile on the public streets of the City of Fresno, County of Fresno, California; and (3) by possessing whisky and alcohol fit for

beverage purposes at Fresno, County of Fresno, California. (Transcript pages 6 and 7.)

The indictment charges six overt acts alleged to have been in furtherance of the said conspiracy and to accomplish the purpose thereof, as follows:

(1) “* * * at the city of Fresno, county of Fresno, state of California, on or about the 15th day of December, 1921, said defendants did sell, to such persons who might thereafter desire to procure same, intoxicating liquor fit for beverage purposes then and there containing in excess of one-half of one per cent by volume;”

(2) “* * * at the city of Fresno, county of Fresno, state of California, on or about the 15th day of December, 1921, the said defendant, John English, *alias* John Kelly, delivered to the office of said defendant, C. A. Burke, in the city of Fresno, a case of intoxicating liquor fit for beverage purposes, then and there containing alcohol in excess of one-half of one per cent by volume;”

(3) “* * * at the city of Fresno, county of Fresno, state of California, on or about the 15th day of December, 1921, said defendant, John English, *alias* John Kelly, transported one case of intoxicating liquor fit for beverage purposes and containing alcohol in excess of one-half of one per cent by volume, over the public streets of the city of Fresno, from the office of said defendant, C. A. Burke, to the home of said defendant George A. Spratt;”

(4) “* * * at the city of Fresno, county of Fresno, state of California, on or about the 10th day of January, 1922, said defendant, George A. Spratt, sent a telegram addressed to defendant John English at No. 745 Market

Street, San Francisco, California, which read, 'Can use 10 shares of stock Friday. Spratt.' "

(5) " * * * at the city of Fresno, county of Fresno, state of California, on or about the 13th day of January, 1922, the said defendant John English, *alias* John Kelly, drove an automobile, containing intoxicating liquor fit for beverage purposes and containing alcohol in excess of one-half of one per cent by volume, over the streets of the city of Fresno to the home of defendant, George A. Spratt."

(6) " * * * at the city of Fresno, county of Fresno, state of California, on or about the 13th day of January, 1922, the said defendant, C. A. Burke, went to the home of said defendant, George A. Spratt."

(Tr. pp. 8 to 10, inclusive.)

Errors Relied Upon.

Plaintiff in error relies upon the following specifications which are hereinafter numbered according to the numbers given to them in the assignment of errors:

II.

The Court erred in overruling defendants' objection to the introduction of evidence of a conversation between witness D. D. Simpson and George A. Spratt, one of the above-named defendants, and erred in admitting said conversation in evidence, said objection being on the ground that said conversation was immaterial, irrelevant and incompetent, the proper foundation has not been laid, there has been no evidence offered to prove or tending to prove the charge alleged in the indictment, to wit, the charge of conspiracy, that as to the defendants

Burke and English it is hearsay, and that it did not take place during the course of any conspiracy alleged in the indictment.

That the witness testified over the objection of defendant as follows:

That the conversation took place about the 9th or 10th of January, that she and Agent Parker told Spratt that they wanted to buy some bonded whisky, that Spratt told them he could sell it in ten case lots for \$125.00 a case; also, alcohol at \$10.00 a gallon; that he knew a man in San Francisco with 300 cases of bonded whisky; that witness and Parker ordered 10 cases of whisky and 10 gallons of alcohol from Spratt; to be delivered January 13, 1922. That Spratt did not mention the name of the party in San Francisco, and the conversation was on January 9th.

That the defendant duly excepted to the ruling of the Court.

(Tr. p. 32.)

III.

That the Court erred in overruling the defendants' objection to the admission as evidence of a conversation had between witness D. D. Simpson and George A. Spratt, had on January 13th, and in admitting said conversation as evidence, said objection being on the same grounds as set forth in paragraph II hereof, to which ruling defendant duly excepted. Said testimony so admitted over the objection of defendant is as follows:

He (meaning George A. Spratt) told me that a load of liquor was on the highway. He asked Mr. Parker if he had the money to pay for it. We were to pay for it when delivered. I told him Mr. Parker had the money. He said, "Well, can I depend on you to be here at 7:30 o'clock." I said we would both be there.

Spratt said he would go out on the highway and tell the man to come in.

(Tr. p. 33.)

IV.

The Court erred in admitting over the objection of defendant evidence of the witness D. D. Simpson of a conversation had with the defendant George A. Spratt on January 13, 1922, to which ruling defendant duly excepted, and which conversation was as follows,

He (meaning Spratt) told me that the man was waiting out on the highway with this load of liquor and he wanted to know if Mr. Parker had the money to pay for it and if he could depend on Mr. Parker and myself being present at 631 "O" Street, that it would be delivered at 7:30 P. M. Burke came in a few minutes later and I spoke to him about a taxi bill I owed and got some money from Mr. Parker to pay him.

Said objection was on the same grounds as set forth in paragraph II hereof.

(Tr. pp. 33 and 34.)

VII.

The Court erred in admitting as evidence over the objection of defendant, to which ruling defendant duly excepted, the evidence of George V. Parker as to a conversation between himself and defendant George A. Spratt, had on January 5th or 6th. The witness had testified that he first saw defendant English on January 13th, and that he had had a conversation with Spratt the first night they met, January 5th or 6th.

Q. What was the conversation that you had with Mr. Spratt there?

Mr. LINDSAY. I object to that as immaterial, irrelevant and incompetent, not within the issues, the proper foundation has not been laid,

and there has been no evidence offered here proving or tending to prove conspiracy as alleged in the indictment, and this objection is made on behalf of all the defendants, and on behalf of the defendants Burke and English I also object on the ground that as to them and each of them, particularly, as hearsay.

The COURT. I will reserve my ruling.

The WITNESS. Spratt said he could supply liquor in any amount, any kind of liquor.

(Tr. pp. 35 and 36.)

VIII.

The Court erred in admitting over the objection of defendant, evidence of the witness Parker as to another conversation as follows:

Q. Did you have a conversation with Spratt the next day at 4 o'clock? A. We did.

Q. I will ask you to state the conversation you had.

Mr. LINDSAY. Same objection as before, if your Honor please.

The COURT. Ruling reserved as to English and Burke. Overruled as to Spratt.

Mr. LINDSAY. Exception.

The witness then testified that Agent Simpson had asked Spratt if he could supply liquor and that Spratt answered yes, and asked how much they wanted and that they told him ten cases, and that Spratt said it was bonded liquor. That they also ordered ten gallons of alcohol. That the conversation was on the 9th. That the conversations were both prior and subsequent to the 13th of January; that English was first mentioned subsequent to the 13th of January when Spratt made a statement as to his dealings with Burke and English on matters that transpired in December, 1921. This was after the raid had been made.

(Tr. p. 36.)

liquor from him; that English told him that he could supply the liquor at \$115.00 a case.

During the testimony it was admitted by the United States Attorney and so held by the Court that this conversation would not bind the defendants Burke and English, but only bind Spratt.

(Tr. pp. 36, 37 and 38.)

X.

The witness was then called on to identify a telegram as being in the handwriting of Spratt and testified that he had seen Spratt sign his name about 20 times.

The testimony was objected to as immaterial and irrelevant and on the ground that the witness had not qualified to answer the question.

The objection was overruled and the witness testified that the signature was George Spratt's.

(Tr. p. 38.)

XI.

Sheldon Hunter was then sworn and testified that he was the Fresno manager of the Western Union. He was shown the telegram. He testified that he had never seen it until he got it out of the office files of the Western Union. He was asked if the telegram had been sent.

Mr. LINDSAY. I object to that as immaterial, irrelevant and incompetent, hearsay, and on the further ground that there has been no evidence here of any conspiracy, therefore evidence as to any overt act alleged in the indictment is irrelevant.

The Court overruled the objection and the defendants except.

The witness then testified over said objection that the telegram had transmission marks on it that the operator had sent it.

(Tr. pp. 38 and 39.)

IX.

The witness was then asked to give the conversation made in the presence of the Federal officials and referred to as a statement. Defendants objected thereto and the Court sustained the objection as to English and Burke and overruled it as to Spratt. The following proceedings were then had.

Mr. LINDSAY. If your Honor please, may I make one more objection that has occurred to me? I understand that the testimony has been declared by your Honor to be irrelevant as to the defendants Burke and English, and my objection has been sustained as to those defendants.

The COURT. Yes.

Mr. LINDSAY. That is the ruling. Then I state that it is irrelevant for all purposes; unless it relates to more than one of the defendants it must be irrelevant. Unless more than one of the alleged conspirators is to be bound by the testimony it must be irrelevant to the single conspirator.

The COURT. Objection overruled.

Mr. LINDSAY. Exception.

The witness then testified over said objection that Spratt said he had secured the liquor he sold during the month of December from John English, that Burke had introduced them, that Burke had advanced Spratt the money to purchase the liquor, that it had been delivered at Spratt's house and was the liquor sold to the Federal agents during the month of December. That Spratt was asked where he had secured this load of liquor and he said he sent a telegram of John English in San Francisco reading, "Can use ten shares of stock Friday night," and that English brought the liquor down there. That Spratt continued and told how he had first met English and secured

XII.

The Government then offered a bottle of liquid, identified by the witness Simpson as one she purchased on the 20th of December at 631 "O" Street, at Spratt's house.

It was objected to by defendants as immaterial, irrelevant and incompetent, not one of the overt acts alleged in the indictment, and not any act in pursuance of the alleged conspiracy.

The objection was overruled and the defendants excepted.

(Tr. p. 39.)

XIII.

The Court erred in admitting as evidence the testimony of the Witness Simpson (recalled) as a conversation relating to the purchase of liquor from defendant Spratt and one Lulu Johnston on the 20th day of December, 1921. The proceedings were as follows:

Q. What was said about the purchase of this liquor by you to either of these defendants, or what was said by any of the defendants concerning it, at the time?

The defendants objected to the same as immaterial, irrelevant and incompetent, hearsay, and not within the issues, and no foundation laid.

The COURT. Objection overruled except as to the defendant English; as to him I will take it under advisement.

Mr. LINDSAY. Exception.

The witness then testified over said objection, —We said to Lulu Johnston and George Spratt in the presence of Burke that we wanted to buy a bottle of whisky and Lulu Johnston and George Spratt said it was genuine whisky and they invited us to have a drink out of another bottle labelled the same. This was about 9

o'clock P. M. I bought the whisky from Johnston and Spratt and the money was given to Johnston by Agent Emerick.

Mr. LINDSAY. I do not understand, if your Honor please, that this Johnston person is accused of being one of these conspirators. We are certainly not bound by anything that was done by this lady in either procuring whisky with the Johnston person or buying whisky.

Mr. ELLIS. She said, your Honor, and I think without question, that she bought it from Spratt and this Johnston woman. They were there at the house together.

The COURT. Wait a minute. This indictment charges a conspiracy between these three defendants and various other persons to the Grand Jurors unknown. Johnston may have been one of those in the conspiracy. I will overrule the objection.

Mr. LINDSAY. Exception.

Mr. ELLIS. I only wanted it for counsel. She said she bought it from Spratt. That is all I wanted to develop. That will be satisfactory.

Mr. LINDSAY. None of it is satisfactory. We have objected to all of it as far as that is concerned.

(Tr. pp. 39 and 40.)

XIV.

The Court erred in admitting the testimony of Byron White concerning a telegram as follows:

Witness testified that he was with the Western Union Telegraph Company in Fresno. He was shown the telegram marked United States Exhibit No. 1 for identification, and continued,

I believe I accepted it across the counter; I do not know the defendant Spratt, I do not know him as the person from whom I received the telegram.

The telegram was then offered in evidence.

Mr. LINDSAY. I object to it as irrelevant, immaterial and incompetent, has not been identified nor in any manner connected with any defendant in this case, not a part of the case, not within the issues.

The COURT. A witness testified that was the defendant Spratt's signature, as I remember it.

Mr. ELLIS. It is.

Mr. LINDSAY. That is the extent of it. No proof that it was ever sent or received.

The COURT. That is for argument to the jury. I will overrule the objection.

To which ruling the defendants duly excepted. The telegram was then, over said objection, admitted in evidence.

(Tr. p. 41.)

XV.

The Court erred in admitting the testimony of the witness Johnston as to a conversation between agents Simpson and Parker and the defendant Spratt during the week preceding the raid on January 13th, concerning liquor, defendants objected to said testimony on the ground that it was immaterial, irrelevant and incompetent, not within the issues, and hearsay as to the defendants English and Burke.

The COURT. As to Burke and English, it will be taken under advisement, overruled as to Spratt.

Mr. LINDSAY. Exception.

Over said objection witness testified that they were still trying to get liquor, but did not remember whether they said anything about how it was to be procured. Spratt said he thought he could get it. She saw English there the night of the 13th when he was brought in by the officers. Did not hear any conversation about a telegram. Simpson told me to ask

Spratt if he had ordered the liquor. He said that he had.

(Tr. pp. 41 and 42.)

XVII.

The Court erred in denying the motion of plaintiff in error John English for a new trial in that the verdict is not supported by the evidence and is against the evidence, and in that the Court committed errors at law at the trial in the admission of evidence over the objection of the defendant English.

XVIII.

The Court erred in denying the motion of plaintiff in error in arrest of judgment, in that there is no evidence of any overt act showing the plaintiff in error John English to have been guilty of a conspiracy, and in that there were errors at law committed at the trial.

(Tr. p. 43.)

Argument.

We wish at the outset to call the attention of the court to the record as to the testimony and evidence objected to and covered by specifications II, III, IV, VII, VIII, XIII and XV. As to all of this testimony upon objection by the defendants it was admitted as to the defendant Spratt, and the court's ruling was expressly reserved as to defendants Burke and English. (See Tr. p. 46, lines 7 and 8 from the bottom; p. 47, lines 17 and 18; p. 48, lines 12 and 13; p. 49, lines 6 and 7; p. 51, line 4 and lines 17 and 18; p. 60, lines 2, 3, and 4; p. 63, lines 17 and 18.) The court at no time admitted or rejected it, and it was, therefore, merely offered

but not received in evidence, and could not properly be considered by the jury.

Counsel attempted to secure a ruling on all of these reserved matters, as appears at the bottom of page 68 and the top of page 69 of the transcript, and the court responded by dismissing the case against the defendant Burke, but made no ruling as to the admission or rejection of the evidence as to the defendant English.

For the purposes of our argument as to admissibility we have treated it as having been admitted. Taking the points up in order:

In II the witness Simpson details a conversation with Spratt about the purchase of whisky, and English is not connected in any way and his name was not even mentioned in the conversation. (Tr. pp. 45, 46 and 47.)

The same is true of III and IV.

(Tr. pp. 47, 48 and 49.)

In VII and VIII the witness Parker related a conversation with Spratt on January 5th or 6th, and stated that he first saw the defendant English on January 13th (Tr. pp. 50 and 51). and another conversation on the 9th.

In XIII and XV the witness Simpson testified as to a purchase of liquor from Lulu Johnston and defendant Spratt, on the 20th of December, 1921, and Lulu Johnston related dealings and conversations with Simpson, Spratt and Parker about liquor.

In none of these cases did English figure at all, and neither at the time this evidence was offered, or at any other time during the trial, was there any evidence to support the charge of conspiracy.

“Proof of the existence of the conspiracy ordinarily should precede any proof of acts or declarations of the co-conspirators.” 16 *Corpus Juris*, Sec. 1288

See also *Hanger v. U. S.*, 173 Fed. 54.

We appreciate that this rule is not absolute or unyielding (*Doyle v. U. S.*, 169 Fed. 625), but in the present case there was no subsequent evidence admitted as to the defendant English, showing a conspiracy.

The evidence regarding the telegram sent by Spratt, to which objection was made as appears by specifications X, XI and XIV (see Tr. pp. 56, 57 and 69), is not binding on defendant English. There is no proof that it was ever delivered to English, and the record (Tr. p. 69) shows that it was delivered to a man named H. Hahn.

There is a presumption that a telegram, or a letter, delivered to the company or the post office in the regular course, for transmission, properly addressed to his true place of residence, or where he is shown to have been, was delivered to the addressee, which presumption is strengthened, if not denied.

Jones on Evidence, Second edition, Section 352, page 47; and Section 353, page 49;
22 *Corpus Juris*, p. 102.

But in the present case there was no showing that 745 Market Street, San Francisco, was the address of English or that he had ever been there. Furthermore, the record affirmatively shows that the telegram was delivered to H. Hahn and no connection is shown between him and English. For these reasons English was not obliged to deny the delivery, for the presumption failed. The presumption attaches on account of the public character of the telegraph company, and does not arise where a message is delivered to an outsider to deliver for transmission, or to deliver after transmission.

37 *Cyc.* p. 1680, Sec. 5. and p. 1682.

The statement of Spratt, at page 65 of the transcript, was properly evidence against Spratt only, it having been made after the arrest of the defendants. It is not evidence against English at all, although it must have been considered against him by the jury—otherwise they could not have believed there was a conspiracy.

If there is struck from the record the evidence that was admitted as to Spratt and rejected as to English, and the law is applied to the testimony concerning the telegram, there remains nothing in the record concerning English, except that he was arrested on January 13th, 1922 in Fresno, with whisky in his possession. (Tr. pp. 49, 56, 64, 67 and 68.)

This absolute lack of evidence can only be appreciated by reading the transcript, from pages

44 to 69, inclusive, and drawing a pencil through pages 52, 53, 54, 55, 65, and all but six lines of 66, all of which evidence so eliminated was rejected as to English.

One should then draw a line through the last half of page 56, all of page 57, the first half of pages 58 and 61, the top of page 62 and all of page 69, all of which refers to the telegram, which we have shown does not bind English.

Of what remains in the bill of exceptions, one should then mark out pages 45, 46, 47, 48, the first six lines of 49, the first sixteen lines of page 51, the last seven lines of page 59, the first four lines of page 60, and all of page 63, with regard to all of which evidence the court made a ruling admitting it as to Spratt, and expressly reserved its ruling as to English. As to English, therefore, this evidence was merely offered, and was neither rejected nor admitted.

If it was not in evidence, we must assume that the jury did not consider it in reaching a verdict. Let us consider now what remains of the evidence to support the verdict. It is only the testimony on pages 49, 50, the first half of 56, 64, the bottom of 66, 67 and 68, which is almost entirely confined to possession of liquor by English in Fresno on January 13, 1922, for which offense the records of the district court at Fresno show he pleaded guilty and paid the penalty shortly after that date.

We have read carefully the case of *Oakland Water Front Co. et al v. Le Roy, et al*, 282 Fed. 285, recently decided by this court, and are mindful of what is said therein about reserved rulings as to evidence.

The present case is we think distinguished from that case. Here, counsel in many cases, excepted to such ruling, and as appears at the bottom of page 68 of the transcript, moved to strike, to which the court's only response was:

“Well, the case against Burke will be dismissed.” (Tr. top of p. 69.)

In the *Le Roy* case the defendants offered the evidence upon which ruling was reserved, the plaintiffs allowed it to go in subject to objection, and the attention of the court was not again called to it. The defendants then attempted to predicate error on the court's failure to rule.

It may be argued that the defendant English should have taken the stand and denied receipt of the telegram, and should have denied a concert of action by previous agreement with the others charged.

But, as we have shown, there was no presumption of its receipt, and the admissions of Spratt, after the arrest, were denied admission into evidence as to English. There was nothing in the record to require that he take the stand, and he stood on his right to be presumed innocent until proven guilty of the conspiracy charged.

We believe the jury was misled by the telegram and the statement of Spratt which was read into the record, and that the court erred in its rulings on evidence above enumerated, and in denying defendant's motion for a new trial.

We, therefore, ask for a new trial at which the plaintiff in error can prove his innocence of conspiracy and that his presence in Fresno on January 13, 1922 was by mere chance, and not in response to the telegram, which he did not receive.

Dated, San Francisco,

October 1, 1923.

Respectfully submitted,

M. A. THOMAS,

CHAS. C. SULLIVAN,

Attorneys for Plaintiff in Error.

No. 4024.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

John English,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

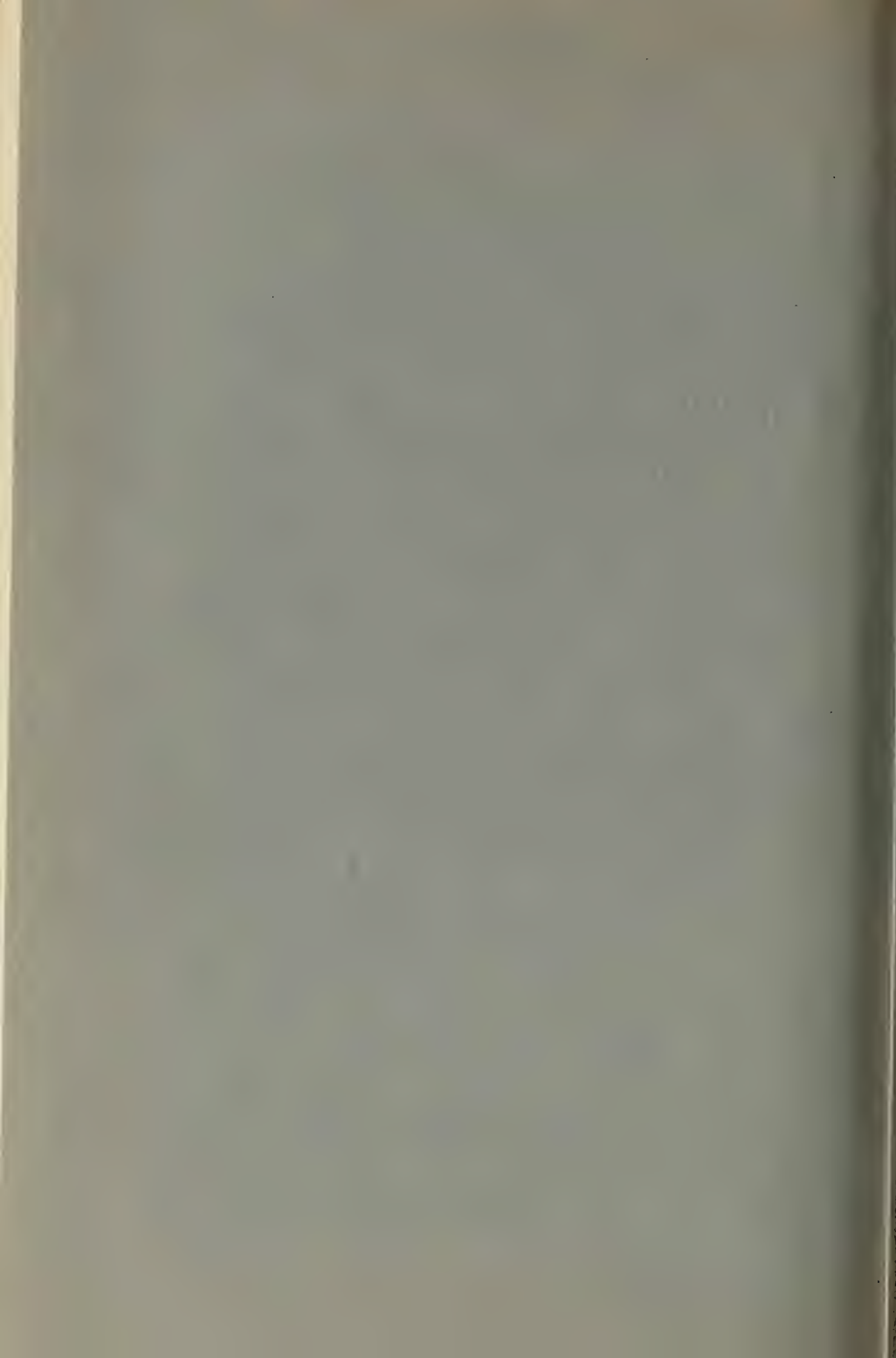
BRIEF OF DEFENDANT IN ERROR.

JOSEPH C. BURKE,

United States Attorney.

HERBERT N. ELLIS,

Special Assistant United States Attorney.



No. 4024.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John English,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error, John English, was convicted and sentenced with one Spratt on a charge of conspiracy to violate the National Prohibition Act, under section 37 of the Federal Penal Code, the said indictment charging that the said defendants, with others unknown, conspired to sell whiskey for beverage purposes and to transport and possess the same in Fresno county, California. The overt acts alleged in the indictment are correctly set out in plaintiff in error's

brief under the statement of the case (pp. 2 and 3 thereof).

The evidence introduced on behalf of the defendant in error conclusively shows that defendants are guilty as charged in the indictment.

Although the burden of showing error rests with the plaintiff in error, defendant in error herewith presents a statement of the evidence in support of this contention.

WITNESS SIMPSON testified that she knew the defendants Spratt, Burke, and English; that on the 9th of January, 1922, she had a conversation with defendant Spratt in the presence of Lulu Johnson and Special Agent Parker, at the home of the defendant Spratt, 631 O street, Fresno, in which she and said Parker told defendant Spratt that they wanted to buy some bonded whiskey; that Spratt thereupon agreed to sell it in ten-case lots at \$125.00 a case, and alcohol at \$10 a gallon, both of which he said he could get from a man whom he said he knew, in San Francisco, and agreed to deliver to Simpson and Parker ten cases of whiskey and ten gallons of alcohol on January 13, 1922, at 631 O street, Fresno, California; that thereafter, on the 13th day of January, 1922, while she was at said premises, at about seven o'clock, she met defendant Spratt, who accompanied her from his house to her hotel; that en route to her hotel defendant Spratt told her that the man was waiting on the highway with the said load of liquor and asked if Mr. Parker had the money to pay for it, and that she told Spratt that

Parker did have the money, and Spratt said, "Can I depend on you to be there at seven-thirty o'clock," to which she replied, "Yes;" that both she and Parker would be there at seven-thirty o'clock, at which time defendant Spratt said the man would deliver the liquor; that she returned to 631 O street about a half hour later with witness Parker and there found Spratt; that while she was there defendants Burke and English, who then gave his name as John Kelly, came in; and that on said occasion defendant English brought with him to the said address 184 one-fifth gallon bottles of intoxicating liquor in an automobile; and in the presence of all the said defendants she saw a dishpan full of one-fifth gallon bottles of liquor labeled "Old Taylor;" that she had first met defendant Burke about December 19 but did not see him again until after January 3, 1922; that she had seen him between the 3d and 13th possibly six times at the home of defendant Spratt, 631 O street, Fresno; that she had had no conversation with Burke relative to liquor; that the first time she met English was on the night of January 13, at 631 O street; that on the 20th of December, at 631 O street, where defendant Spratt lived, in the presence of defendant Burke, she had purchased from one Johnson and defendant Spratt a bottle of whiskey, which she identified as the one shown her. [Tr. pp. 45 to 50 and 58 to 60.]

WITNESS GEORGE B. PARKER testified that he knew the defendants Spratt, Burke, and English; that he,

in company with D. D. Simpson, had met Spratt and one Lulu Johnson at 631 O street on the 8th of January, at which time Agent Simpson asked Spratt if he could supply liquor, and Spratt answered, "Yes," and asked them what kind of liquor they wanted and how much; that they told Spratt they wanted about ten cases, and were informed by Spratt that the liquor was bonded, and that he could also supply alcohol to them; that Spratt told them he could get liquor from a man in San Francisco and that he would send for it and have it there Friday night (January 13); that he was there Friday night and saw a bottle of liquor in defendant English's pocket; that defendant Burke had arrived at the place of delivery about five minutes before defendant English; that a dishpan full of bottles of the same kind of liquor that English had in his pocket was brought in; that defendants Spratt and English were brought in a few minutes after; that the bottle in English's pocket and the bottles in the dishpan were one-fifth gallon size; that he did not remember the name on the bottle but that all the bottles were stamped; that he is familiar with Spratt's handwriting; that he had seen Spratt sign his name about twenty times; that he had seen Spratt's signature and handwriting on innumerable occasions; and that the signature on the telegram (United States Exhibit 1) was Spratt's. [Tr. pp. 50 to 55.] This exhibit read:

Fresno, Cal., January 11, 1922.

John English, 745 Market street, care of Golden Rule, San Francisco. "Need ten shares of stock Friday." (Signed Spratt.) [Tr. pp. 61, 69.]

WITNESS LULU JOHNSON testified that she had seen a bottle like the one concerning which witness Simpson testified, which bottle was brought to her house (631 O street) with twelve other bottles by defendant Spratt; that one of said bottles was sold to witness Simpson; that for about a week she had heard Spratt, Simpson and Parker talk about liquor; that the gist of the conversation so heard was that the witnesses Parker and Simpson were trying to get the liquor, one so much, the other so much—get it together and deliver it to suit themselves; that she had heard Spratt say that he thought he could get it; that defendant Burke was there on the night of January 13th, at which time she saw English brought in by the officers; that Spratt had said he had ordered the liquor; that she had seen a large dishpan full of bottles about the size of the bottle which Simpson had bought; and that the officers brought said liquor into the house the night of the raid. [Tr. pp. 63-64.]

WITNESS PARKER then identified a writing which had been signed in his presence by defendant Spratt. [Tr. p. 64.]

The writing was offered and received in evidence as against Spratt only; and read:

“On or about December 15, 1921, I ordered a case of ‘Old Crow’ whiskey from John English, *alias* Jack Kelley, which he delivered to me on that day. I first met English in the Pioneer Bar, where he gave me a drink. That was along about December 15, 1921. Later C. A. Burke called me over the phone and asked me to come to his office. When I arrived at

Burke's office English was there and offered me some more of the whiskey. After drinking it he asked me if I could handle some of it. I asked him how much it was and he made a price of \$115.00 per case. I told him that I could not pay that much, but would like to get a bottle. He refused to sell less than a case, and after talking it over with Burke, I took a case, Burke agreeing to let me have the money to make the purchase. It was understood that it was to be taken to my house and as Burke wanted a bottle he was to come down and get it. He was to give me credit for whatever he took under this arrangement."

"After the dinner party on this day, and after Judge Irving had departed from the house, I had a long conversation with D. D. Simpson, then known to me as Irene Conlan, and George Parker, now known to me as a special agent of the Bureau of Internal Revenue. During this conversation arrangements were made whereby I was to act as an agent in the securing of ten cases of whiskey and ten gallons of alcohol. This liquor was to be secured from John English, *alias* Jack Kelley, and to secure same I wired to San Francisco to John English, 745 Market street, such telegram reading as follows:

"'Can use ten shares of stock Friday,' and signed 'Spratt.'

"It was previously agreed between English and myself that in case I ordered whiskey I was to send a telegram reading in that way." [Tr. pp. 65 to 66.]

WITNESS NICELY testified that he saw defendants Burke, Spratt, and English at 631 O street on the night of January 13, 1922; and that on that occasion he had taken a certificate of registration (United

States Exhibit 5) from an Essex car, which said Essex car was registered in the name of John English (of San Francisco) with the Motor Vehicle Department of the state of California, and from which said car he had also taken a collection of bottles shown him, one of which he identified as United States Exhibit 6, and concerning which he testified that its alcoholic content was 55 per cent by volume; that it was in the same condition as when taken from the said Essex car on January 13, 1922; that the remainder of said bottles were then identified and introduced in evidence as United States Exhibit 7; that said Exhibit consisted of 184 (one-fifth gallon) bottles of alcoholic liquor which had been found in and moved from the said Essex car by him on said date. Witness further testified that before and after removing said bottles from said automobile he saw defendants Spratt, Burke, and English at 631 O street on the night of January 13, 1922. [Tr. pp. 66 to 68.]

WITNESS SHELDON HUNTER testified that United States Exhibit No. 1, which was a telegram dated at Fresno, on January 11, 1922, addressed to John English, 745 Market street, care of Golden Rule, San Francisco, California, reading: "Need ten shares stock Friday," and signed, Spratt, which telegram left Fresno at 9:15 and was delivered at 10:10 to a man named H. Hahn; and that no part of his record showed that John English had ever received the telegram. It was thereupon stipulated that the said telegram, United States Exhibit No. 1, was sent from Fresno to San Francisco. [Tr. p. 69.]

ARGUMENT.

From the foregoing evidence, disregarding the declarations made by defendant Spratt during the progress and after the consummation of the conspiracy, the record discloses that witness Simpson had, on the 15th day of December, purchased a bottle of whiskey from defendant Spratt and Lulu Johnson; that about January 9, 1922, Agents Simpson and Parker went to the home of defendant Spratt and told him that they wanted to buy some bonded whiskey and ordered ten cases of whiskey and ten gallons of alcohol to be delivered January 13, 1922; that on the 11th of January Spratt sent a telegram (United States Exhibit No. 1) addressed to John English at San Francisco, reading: "Need ten shares stock on Friday; that thereafter, on Friday, the 13th of January, witness saw Spratt at about seven o'clock at his said home, from which place she went with him to her hotel; that while en route to her hotel with Spratt she told him that she and Parker had the money which they had agreed to pay for the liquor when delivered, and that she and Parker would return to his home at seven-thirty o'clock; that she returned to 631 O street about a half hour later with witness Parker, and she there found Spratt; that while she was there defendants Burke and English, who then gave his name as John Kelly, came in; and that on said occasion the defendant English brought with him to said address 184 one-fifth gallon bottles of intoxicating liquor in an automobile.

These circumstances furnish sufficient evidence from which the jury could infer that these several people were engaged in a conspiracy to procure, transport, possess, and sell intoxicating liquor. Certainly the said evidence lays a sufficient foundation for the introduction of the declarations made by Spratt, one of the defendants, during the progress of the conspiracy. This, with the said declarations of Spratt, makes out a remarkably strong case against defendant English, for, from the conversations had with Spratt, it is apparent that Spratt was in a conspiracy with a man in San Francisco to violate the National Prohibition Act as charged. The identity of this man was revealed when English appeared on the scene on January 13, with the liquor, at the time and place that defendant Spratt had fixed and concerning which he had arranged with witness Simpson and Parker.

It is submitted that this evidence connects the defendant English with the conspiracy sufficiently to authorize the admission against him of the statement of his co-conspirator Spratt.

In *Taylor v. United States*, 89 Fed. 954, this court (at p. 956) says:

“We think that these facts were sufficient to establish a *prima facie* case against the plaintiff in error, so that the court was justified in admitting the statements of his co-conspirators which connected him directly with the offense which was charged against them all.”

It is submitted that the same statement applies with equal force to the facts in this case.

Furthermore, there is another ground on which the declarations of Spratt made in the progress of the conspiracy were properly admitted, to-wit, the said statements formed part of the *res gestae* of the crime charged in the indictment. The general rule was stated in the case of *Wiborg v. United States*, 163 U. S. 632 (p. 657), where the court says:

“There was evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: ‘If these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition,’ and to this an exception was taken. The general rule was stated in *American Fur Co. v. United States*, 2 Pet. 358, 365, by Mr. Justice Washington, speaking for the court, that ‘where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others.’ The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the *Horsa* had been proven, then, on the question whether such combination was lawful or not, the motive and intention, declarations of those engaged in it ex-

planatory of acts done in furtherance of its object came within the general rule and were competent. *St. Clair v. United States*, 154 U. S. 134; *People v. Davis*, 56 N. Y. 95, 102; *Lincoln v. Claflin*, 7 Wall, 132, 139; 1 Greenl. Ev. Sec. 111; *Starkie Ev.* 466.”

Also to the same effect is the case of *Fitter v. United States*, 288 Fed. 582, and the case of *Rea v. Missouri*, 84 U. S. 532, 544, in which the court says:

“Any statements made by Fuller in the absence of Hayes, which were afterwards assented to by the latter, or which were part of the *res gestae* of the purchase of the goods, were competent evidence.”

Furthermore the defendant in error cannot at this time question the admissibility of said evidence for the reason which appears in the record [Tr. p. 62] to-wit:

“Mr. Lindsay: I further object on the part of the defendant Burke that whatever defendant Spratt may have done would not be binding on him in the present stage of the testimony.

The Court: I will reserve my ruling as to him.

Mr. Lindsay: And English also?

The Court: Yes, sir. I might submit the whole matter to the jury under instructions.”

Inasmuch as no exception was taken to the instructions of the court, its instructions must be considered as correct and that the defendants' rights were properly safeguarded and cannot be questioned at this time. Hence there can be no doubt that the rights

of the defendant (English) with regard to this evidence were fully protected.

Walton v. Tepel, 210 Fed. 161.

The only remaining question raised by the brief of plaintiff in error is the question of the effect of the telegram sent to defendant English (United States Exhibit No. 1), which was received in evidence without objection and concerning which defendant John English stipulated that it was sent from Fresno to San Francisco. The overt act alleged in the indictment to which this evidence was directed is referred to as "Overt Act No. 4," and this evidence proves the overt act as laid therein. No allegation is made that defendant English received the telegram. This same point was made in the case of Alderman v. United States, reported in 279 Fed. 259, where the court (on p. 261) says:

"There was no error in the admission of the telegram, signed J. H. Alderman, addressed to Larncce Washbern. This telegram was proved to have been delivered for transmission to the telegraph company by the defendant Alderman, and was sent by the telegraph company to Tampa, as directed. The sending of this telegram was one of the overt acts charged in count 1. Proof of its receipt was not necessary to sustain this allegation."

It is submitted that the bringing of said intoxicating liquor to Spratt's house under the circumstances presented a question of fact for the jury alone to de-

termine, whether English, in so doing, was furthering the conspiracy alleged in the indictment.

The suggestion in plaintiff in error's brief (p. 18):

"* * * that his presence in Fresno on January 13, 1922, was by mere chance, and not in response to the telegram, which he did not receive,"

cannot be considered by this court. On this point the court, in *Humes v. United States*, 170 U. S. 210 (p. 212) says:

"The alleged fact that the verdict was against the weight of the evidence we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict."

And in *Alderman v. United States* (*supra*), at page 260:

"The weight of the evidence or credibility of the witnesses is not for this court. *Humes v. United States*, 170 U. S. 210, 212, 18 Sup. Ct. 602, 42 L. Ed. 1011; *Crompton v. United States*, 138 U. S. 361, 363, 11 Sup. Ct. 355, 34 L. Ed. 948."

In closing, defendant in error submits to the consideration of the court the following defect in the record affecting the jurisdiction of this court to entertain this appeal.

The clerk's minutes for January 5 show that an order was obtained on that date extending the time within which to settle the bill of exceptions herein fifteen days from the date thereof. The time as so

extended expired on January 20. No order was made on said date extending the time within which to settle said bill of exceptions, but two days later, on January 22, the court made an order extending the time to file the proposed bill of exceptions for one day, from which it appears there is a hiatus of two days, which would defeat the jurisdiction of this court to entertain the appeal herein.

O'Connell v. United States, 253 U. S. 142, 147; which was affirmed in Exporters v. Butterworth-Judson Co., 258 U. S. 365, 369.

We respectfully submit that there is no error in the record and that the judgment of the lower court should be affirmed.

Dated at Los Angeles this 12 day of Oct., 1923.

JOSEPH C. BURKE,

United States Attorney.

HERBERT N. ELLIS,

Special Assistant United States Attorney.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OAKLAND MOTOR CAR COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Apellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



United States
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

P. R. LUND, Esq., Attorney for Appellant, San Francisco, Calif.

UNITED STATES ATTORNEY, Attorney for Appellee, San Francisco, Calif.

In the United States District Court for the Northern District of California.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make up the record on appeal in the above-entitled cause including herein the following documents on file in your office:

1. Affidavit and petition of Oakland Motor Car Company for return of automobile, together with Exhibit "A" attached thereto.
2. The answer of the United States of America to said petition, together with any exhibits which may be thereto attached.

3. The order of Court made and entered April 14th, 1923, denying the application of said Oakland Motor Car Company.

4. The petition for appeal.

5. Specification of errors.

6. Order allowing appeal.

7. Undertaking on appeal.

8. Supersedeas order.

9. Citation on appeal.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed at 10 o'clock and 15 min.
A. M., Apr. 26, 1923. Walter B. Maling, Clerk.
By C. M. Taylor, Deputy Clerk. [1*]

In the United States District Court for the North-
ern District of California, Division One.

12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

*Page-number appearing at foot of page of original certified Transcript of Record.

Affidavit of D. A. Healey and Petition of Oakland Motor Car Company (for Return of Automobile).

State of California,

City and County of San Francisco,—ss.

D. A. Healey, being first duly sworn, deposes and says:

That at all of the times herein mentioned Oakland Motor Car Company was and now is engaged in the manufacture of and sale of automobiles in the City and County of San Francisco and at all of said times this affiant was and now is an employee of the said Oakland Motor Car Company and as such employee is fully familiar with the facts below stated and hence makes this affidavit on behalf of said Oakland Motor Car Company.

That on or about the 1st day of May, 1922, Oakland Motor Car Company sold and Daniel Belli purchased from said Oakland Motor Car Company, one Oakland 1921-22 Touring Car 34-D No. 167278, Motor No. H-81435.

That said sale was evidenced by a certain agreement in writing executed on or about the 1st day of May, 1922, and that a true copy of said agreement is annexed to this affidavit and made a part thereof for all purposes.

That the purchase price agreed upon between the buyer and the seller for the said automobile was Nine Hundred Ninety-four and 8/100 (\$994.08) Dollars, to that Three Hundred and [2] 00/100

(\$300.00) Dollars, was paid at the time of delivery of said automobile and subsequently thereto monthly payments, upon the balance due, were made so that at this time there remains due from the said Daniel Belli to Oakland Motor Car Company on account of the said balance of said purchase price the sum of Six Hundred Ninety-four and 8/100 (\$694.08) Dollars.

That under the terms of said contract the legal title to said automobile remains in the Oakland Motor Car Company until the full purchase price of Nine Hundred Ninety-four and 8/100 (\$994.08) Dollars has been paid.

That affiant is informed and believes that the said Daniel Belli, the defendant herein, has no property or assets of record in the City and County of San Francisco upon which an execution could be levied.

That one of the provisions of said contract of sale is that the purchaser shall not at any time permit the said automobile to be removed from his possession or to permit any adverse claim of any character against the same, and not to operate the same contrary to law.

That affiant is informed and believes and on such information and belief states that in the month of September, 1922, in the City and County of San Francisco, State of California, the said defendant, Daniel Belli, was arrested and the said automobile was seized for the alleged unlawful transportation of intoxicating liquor in violation of the so-called National Prohibition Act and that the said automobile is now in the possession and custody of the

United States Prohibition Enforcement Officer at San Francisco, California, and that said automobile is subjected to the further order of this Court.

Affiant further states that at the time said automobile [3] was entrusted to the care and custody of Daniel Belli, defendant herein, this affiant had no knowledge or information nor has said affiant had any notice or information or suspected that at the time said automobile was entrusted to the care and custody of Daniel Belli, defendant herein, and the Oakland Motor Car Company had no knowledge or information nor has it had any notice or information or suspected that said Daniel Belli, since that time intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

D. A. HEALEY.

Subscribed and sworn to before me this 2d day of Jany., 1923.

[Seal]

R. P. SHAPRO,

Notary Public, in and for the City and County of San Francisco, State of California.

My commission expires October 7th, 1924.

Petition of Oakland Motor Car Company for Return of Automobile.

Wherefore your petitioner, Oakland Motor Car Company, prays for an order of this Court restoring and surrendering to it the said automobile in accordance with the provisions of said contract of sale hereto annexed, because of the breach by the purchaser of one of the essential conditions of said

contract; or if the said automobile is not so restored and surrendered to your petitioner, but the same be sold in the manner provided by law that in that event, the amount due your petitioner be paid in full out of the moneys realized from said sale, unless the amount paid for said automobile at the time of said sale be less than Six Hundred Ninety-four and 8/100 (\$694.08) Dollars, in which event your petitioner prays that the said automobile be returned to your petitioner. [4]

P. R. LUND,

Attorney for Petitioner,
#444 California Street,
San Francisco, California.

Receipt of copy of the within petition admitted
this 26th day of February, 1923.

JOHN T. WILLIAMS,

E. L.

U. S. Attorney.

[Endorsed]: Filed Feb. 27, 1923. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [5]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Answer to Petition for Return of Personal Property.

Comes now the above-named plaintiff, by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of petitioner herein, denies and alleges as follows:

That plaintiff and respondent have no information or belief respecting the allegations in petitioner's petition herein, to wit: "That at the time said automobile was entrusted to the care and custody of Daniel Belli, defendant herein, this affiant had no knowledge or information nor has said affiant had any notice or information or suspected that at the time said automobile was entrusted to the care and custody of Daniel Belli, defendant herein, and the Oakland Motor Car Company had no knowledge or information nor has it had any notice or infor-

mation or suspected that said Daniel Belli, since that time intended to use or was using said automobile in unlawfully transporting intoxicating liquors," sufficient to enable plaintiff or respondent to answer the same, and basing his answer upon that ground denies that when said car was entrusted to the care or custody of Daniel Belli the said affiant D. A. Healey had no knowledge, notice, information or suspected that said Daniel Belli intended to use [8] or was using said automobile in unlawfully transporting intoxicating liquor, and upon the same ground denies that the said Oakland Motor Car Company had no knowledge, information, notice or suspected that the said Daniel Belli intended to use or was using said automobile in said unlawful transportation of intoxicating liquor.

That the facts and circumstances connected with the seizure of said automobile are fully set out in the affidavit of one J. C. Lighthouse, which said affidavit is hereto attached, made part hereof, and marked Exhibit "A," to the same effect as if again set out herein in full.

WHEREFORE plaintiff and respondent prays that said petition be denied.

JOHN T. WILLIAMS,

United States Attorney,

BEN F. GEIS,

Assistant United States Atty.,

Attorneys for Plaintiff. [9]

Exhibit "A."

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Affidavit of J. C. Lighthouse.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

J. C. Lighthouse, being first duly sworn, deposes and says: That he is and at all of the times herein mentioned was a Deputy Collector of the Internal Revenue for the First Internal Revenue Collection District of the State of California.

That on the 26th day of September, 1922, affiant as such Deputy Collector of Internal Revenue, and acting as such, was at 378 Broadway Street, City and County of San Francisco, State of California, and while there present the defendant Daniel Belli drove up to said place in an Oakland 1921-22 touring car, being the car mentioned, described and referred to in petitioner's petition herein; that at the time the said defendant drove up to said place he had in the said touring car two five-gallon kegs of

intoxicating liquor, to wit, brandy, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, and had transported the same from some place unknown to affiant to said No. 378 Broadway Street in said City and county; that the said defendant at the time of the said transportation had no permit to transport or have in his possession said or any intoxicating liquor; that affiant then and there seized the said liquor and said automobile and immediately thereafter, to wit, the last-mentioned date, made an affidavit and caused an information to be filed [10] charging the said defendant with possessing and transporting the said intoxicating liquor.

That thereafter and heretofore, affiant as such Deputy Collector of Internal Revenue, delivered the said car and said property to Samuel F. Rutter as Prohibition Director in and for the State of California, and the same is now in his possession.

J. C. LIGHTHOUSE.

Subscribed and sworn to before me this 9th day of March, A. D. 1923.

[Seal]

C. M. TAYLOR,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 10, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL et al.,

Defendant.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

Order Denying Motion (for Return of Automobile).

PARTRIDGE, JOHN S. [12]

In each of the above-entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition law provides: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile . . . and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall order the liquor destroyed and, unless good cause to the contrary is shown by the owner, shall order a sale by public

auction of the property seized, and the officer making the sale . . . shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor.” [13]

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Silvester*, 273 Fed. 253 allowed a lien for the amount of the unpaid purchase price under what the opinion calls “a conditional bill of sale,” although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit “a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law.”

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshal Montgomery, et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: “It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this state that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. App. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price: [14]

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Parke & Lacey Company vs. White River Lumber Company*, 101 Cal. 37, *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony* 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States*, No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved was whether Section 3450 of the Revised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under Section 3450, the conveyance in which goods were moved in an at-

tempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provisions of the Revised Statutes was in effect repealed by Section 26 of the National Prohibition Act. It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:
[15]

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;
2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

[Endorsed]: Filed Apr. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[16]

In the United States District Court for the Northern District of California.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Petition for Appeal.

To the Honorable JOHN S. PARTRIDGE, District Judge.

The Oakland Motor Car Company, petitioner herein, feeling aggrieved by the decree and order rendered and entered in the above-entitled cause on the 14th day of April, A. D. 1923, does hereby appeal from said decree and order to the Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said decree and order was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[17]

In the United States District Court for the Northern District of California.

No. 12,871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

Assignment of Errors.

Now comes the Oakland Motor Car Company, petitioner herein, in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree and order made by this Honorable Court on the 14th day of April, 1923.

I.

That the United States District Court for the Northern District of California erred in refusing to render an order and decree pursuant to the petition of the Oakland Motor Car Company, filed in

the above cause, applying for the return to it, the said Oakland Motor Car Company, of a certain touring car in said petition described.

II.

That the United States District Court for the Northern District of California erred in refusing to decree that the Oakland Motor Car Company have a lien, after deducting the cost of seizure and expenses of keeping and sale of the certain touring car, described in the petition of the said Oakland Motor Car Company filed herein, to the extent of Six Hundred Ninety-four [18] and 8/100 (\$694.-08.) Dollars.

III.

That the United States District Court for the Northern District of California erred in refusing to decree that the Oakland Motor Car Company have a lien upon the proceeds of sale of the certain touring car described in the petition of the said Oakland Motor Car Company, filed herein.

P. R. LUND,

Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[19]

In the United States District Court for the North-
ern District of California.

Nb. 12871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Order Allowing Appeal.

On motion of P. R. Lund, Esq., solicitor and counsel for the Oakland Motor Car Company, petitioner herein, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Judicial District from an order and decree heretofore filed and entered herein, be, and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Judicial District. It is further ordered that the bond on appeal be fixed in the sum of \$500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

JOHN S. PARTRIDGE,

Judge.

Dated this 24th day of April, 1923.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[20]

In the United States District Court for the Northern District of California.

No. 12871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Supersedeas Order.

This cause coming on to be heard this —— day of April, 1923, upon the application of the appellant for an appeal to the Circuit Court of Appeals for the Ninth Judicial District and said appeal having been allowed, it is ordered that the same shall act as a supersedeas, the said appellant having executed bonds in the sum of \$500.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the Northern District of California until the further order of this court.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Galbreath, Deputy Clerk.

[21]

In the United States District Court for the Northern District of California.

No. 12871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and licensed and authorized to conduct a bonding and surety business within and under the laws of the State of California is held, and firmly bound unto the United States of America in the full and just sum of \$500.00, to be paid to the said United States of America; to which payment well and truly to be made, the said Globe Indemnity Company hereby binds itself, its successors and assigns by these presents.

Signed, sealed and executed at San Francisco, California, this 26th day of April, A. D. 1923, on behalf of the Globe Indemnity Company by its attorney in fact, thereunto duly authorized.

Whereas, lately at a District Court of the United States for the Northern District of California in the above-entitled cause pending in said Court, an order and decree was rendered against the Oakland

Motor Car Company, petitioner, in intervention in said action, and the said Oakland Motor Car Company having obtained from said Court, an appeal to reverse the order and decree [22] in the aforesaid intervention and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Oakland Motor Car Company shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GLOBE INDEMNITY COMPANY,
(Signed) By J. S. ELLIOTT, (Seal)
Attorney in Fact.
J. S. ELLIOTT.

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[23]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America vs. Daniel Belli (Oakland Motor Car Co. Claimant of Automobile), No. 12871, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the attorney for claimant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eight Dollars and Seventy-five Cents (\$8.75), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of May, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [24]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America and to the Honorable JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein United States of America is plaintiff and Daniel Belli is defendant and petitioner in intervention, Oakland Motor Car Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 26th day of April, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 12,871. United States District Court for the Northern District of California.

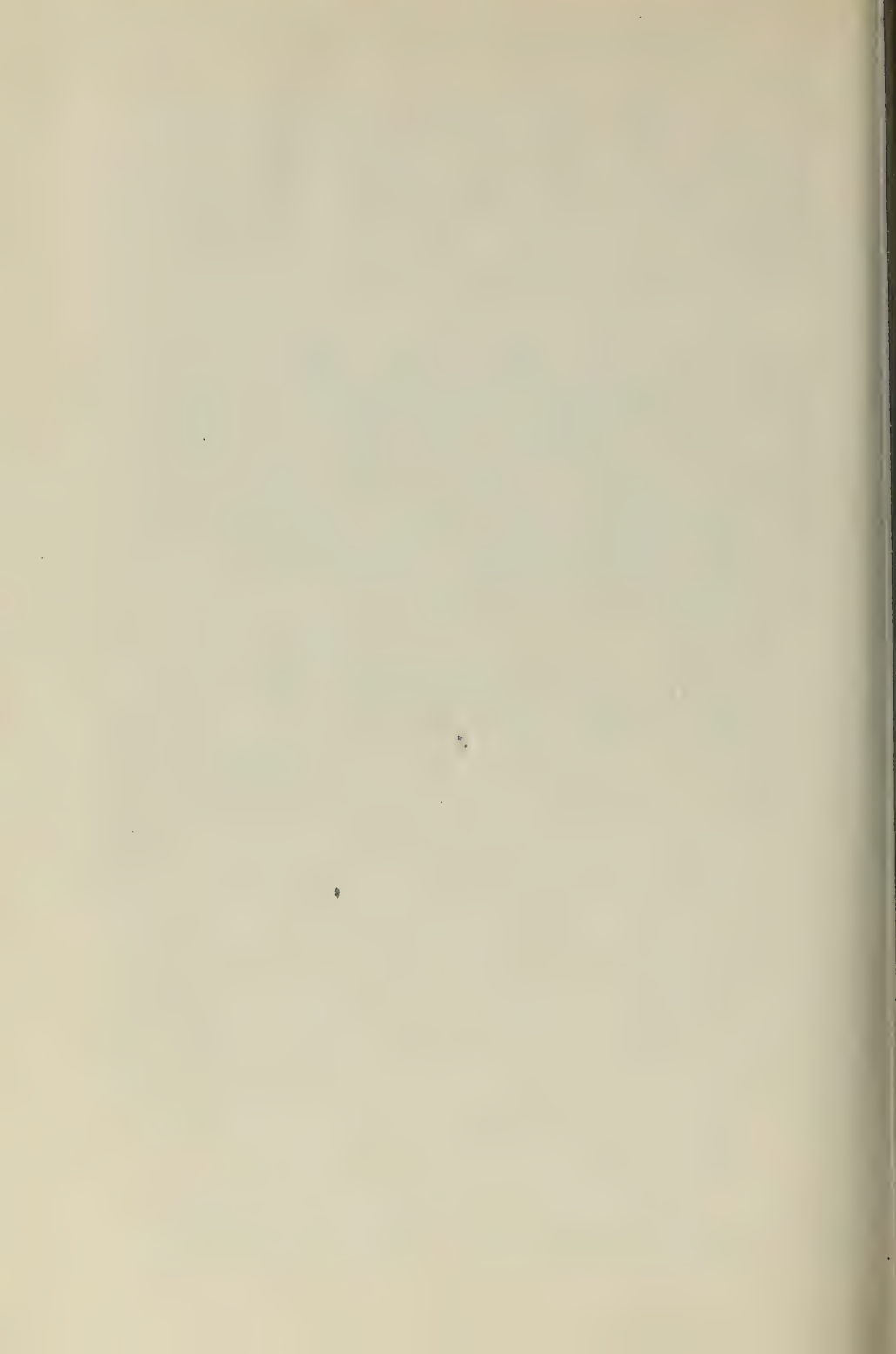
Oakland Motor Car Company, (a Corporation),
Appellant, vs. United States of America. Cita-
tion on Appeal. Filed Apr. 26, 1923. Walter B.
Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

[Endorsed]: No. 4025. United States Circuit
Court of Appeals for the Ninth Circuit. Oakland
Motor Car Company, Appellant, vs. United
States of America, Appellee. Transcript of Rec-
ord. Upon Appeal from the Southern Division of
the United States District Court for the Northern
District of California, First Division.

Filed May 8, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OAKLAND MOTOR CAR COMPANY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

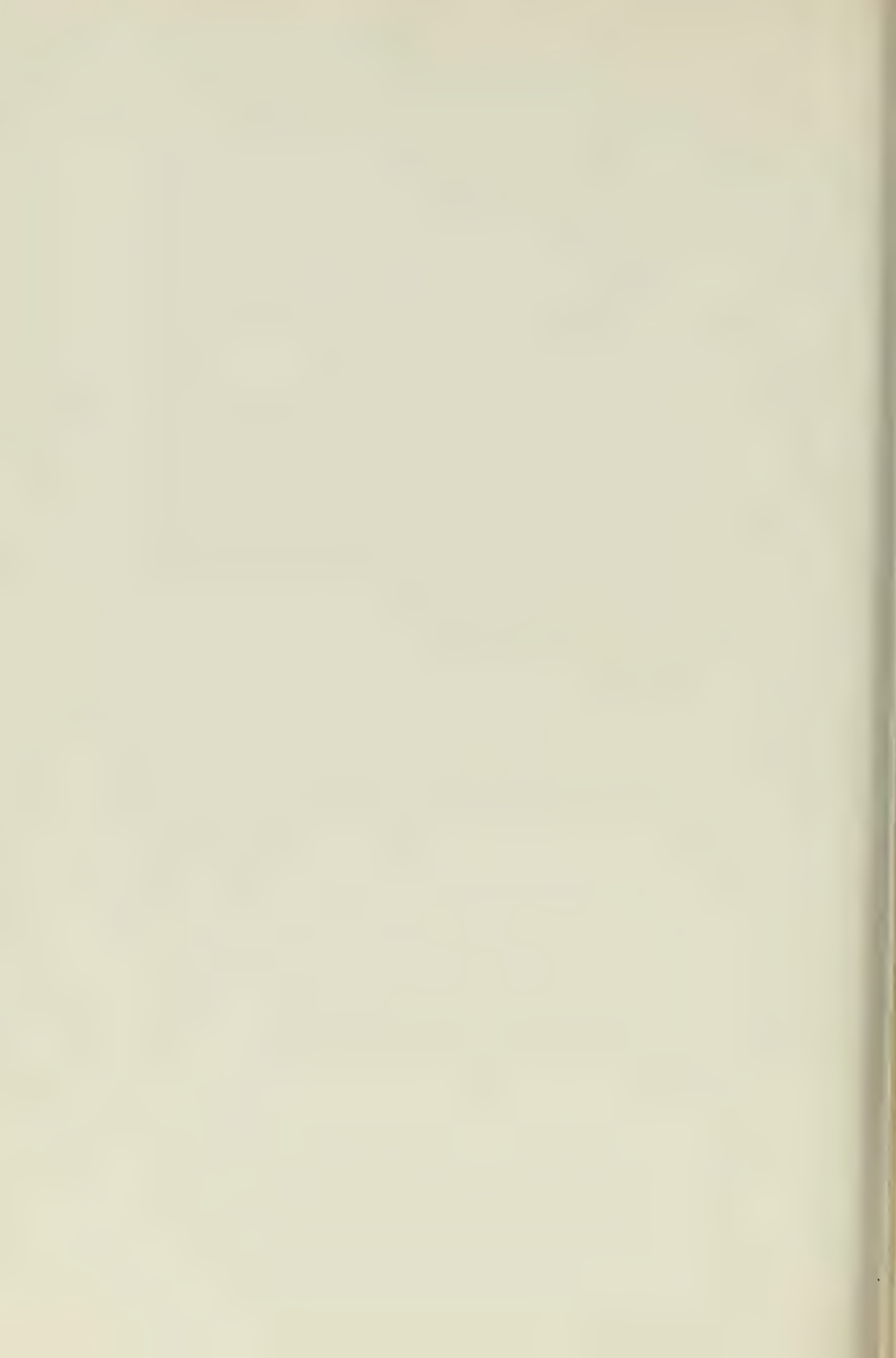
Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

BRIEF FOR APPELLANT

P. R. LUND,

Attorney for Appellant.

FILED
JUN 4 - 1923
B. D. MONGKTON
CLERK



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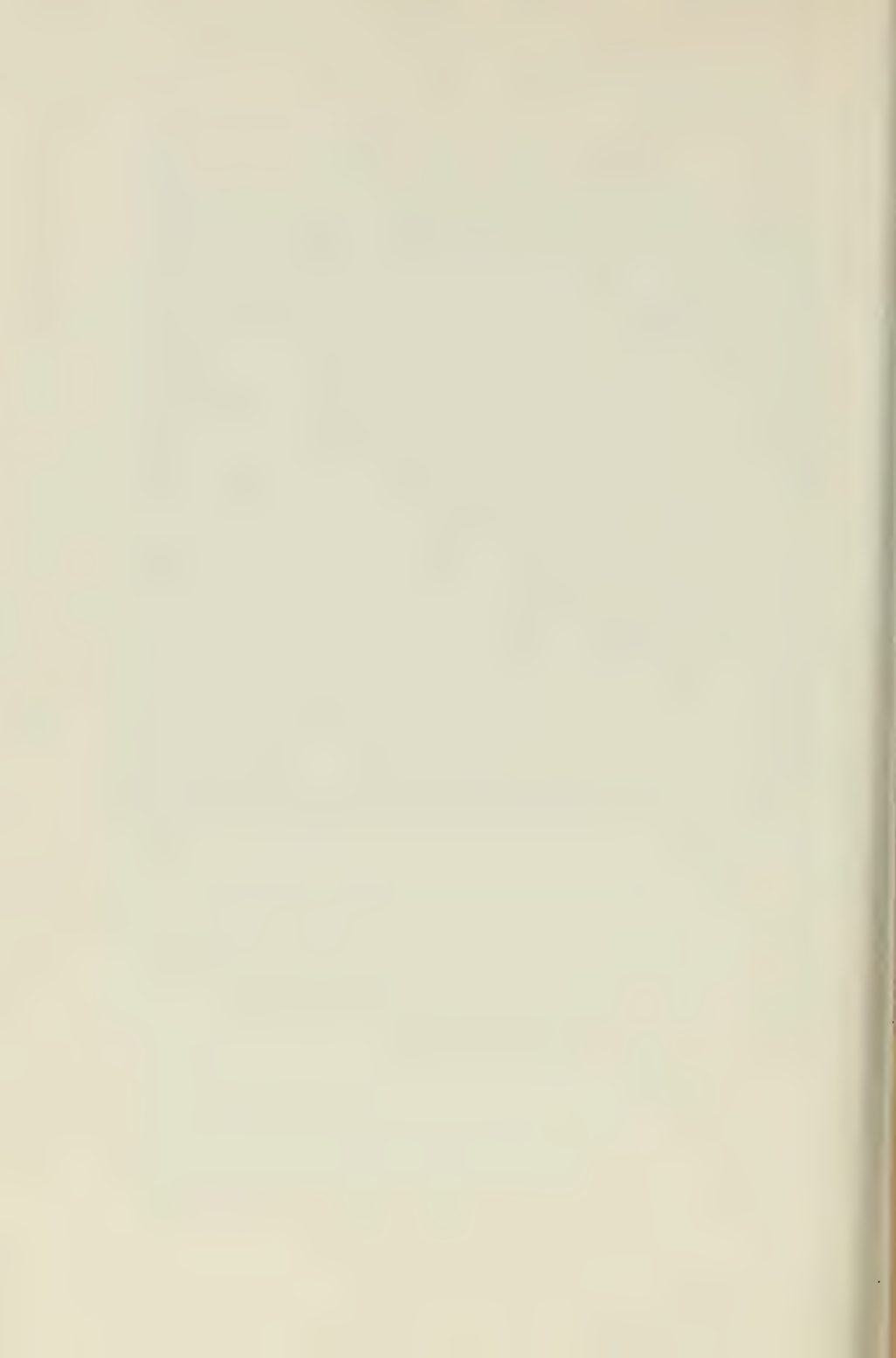
ARGUMENT

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No. 4025

United States Circuit Court of Appeals
For the Ninth Circuit

OAKLAND MOTOR CAR COMPANY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

THE FACTS

This is an appeal from an order of the United States District Court for the Northern District of California, denying the relief sought by the intervenor there and appellant here, Oakland Motor Car Company, through a petition for the return of personal property; or in lieu of the return thereof, the establishment of a lien in favor of petitioner upon the proceeds derived from the sale of said personal property, the said petition in intervention having been filed in the proceeding entitled "*United States of America versus Daniel Belli*," No. 12871 upon the records of said Court.

Said intervening petition (R3) shows that on May 1st, 1922, an agreement, generally known as a contract of conditional sale, or a conditional sales

contract, was entered into between Oakland Motor Car Company, and one Daniel Belli, for the purchase by the latter from Oakland Motor Car Company of an automobile, of a model known as an "Oakland Touring Car", and which was particularly described in said contract, a copy of which is attached to the intervening petition (R6).

The purchase price agreed upon was \$994.08. At the time the contract was executed, the sum of \$300.00 was paid by Belli to the vendor, Oakland Motor Car Company. The balance of the purchase price, it was agreed should be paid in monthly installments. The vendor reserved to itself title to said automobile until the full amount of the agreed purchase price was paid, upon which event the automobile, by the terms of the contract, was to become the absolute property of Belli; but, by the terms of the contract, Belli was entitled to immediate possession of the automobile and he was entitled to possess and control the same at all times from the date of the contract so long as he made the installment payments and observed the conditions of the contract.

On the date the contract was executed, May 1st, 1922, Belli took possession of the automobile and thenceforth it was under the control of Belli.

The transaction, as is the case in the great majority of instances when automobiles are sold upon installment payment terms—and it is matter of common knowledge that large numbers of automobiles are so sold—did not differ materially from a

transaction wherein a part of the purchase price is paid at the time of delivery and a chattel mortgage upon the automobile is taken by the vendor to secure payment of the balance of the purchase price. It differed not at all as to any control of the automobile by the vendor, so long as the vendee observed the conditions of the contract.

The intervening petition (R3) states that at the time said automobile was entrusted to the care and custody of Belli, the petitioner, Oakland Motor Car Company, had no knowledge or information, nor had the petitioner at that time or subsequently—until the arrest of said Belli, as hereinafter set forth—any notice or information, nor had petitioner suspected, that at the time said automobile was entrusted to Belli, or subsequently, that Belli intended to use or was using said automobile in unlawfully transporting intoxicating liquor.

From the time of the delivery of the automobile until the arrest of Belli, he made the payments provided for in the said contract and performed the conditions thereof; so that during that time he was entitled to retain undisturbed possession and full control of the automobile and the Oakland Motor Car Company could not have exercised any control over it. The charge upon which Belli was arrested was for a first offense and there is no pretense that he was a known offender against the National Prohibition Act.

In the month of September, 1922, Belli was arrested for the illegal transportation of intoxicating liquor, and the said automobile was seized by the prohibition enforcement officers.

At said time there remained due to Oakland Motor Car Company, as the balance of the purchase of the said automobile, the sum of \$694.08. No payments on account thereof have since been made, and the said \$694.08 is still unpaid.

In January, 1923, Oakland Motor Car Company filed its intervening petition and prayed an order restoring it to possession of said automobile, or, in lieu thereof, for an order establishing a lien in favor of petitioner upon the proceeds realized from the sale of said automobile to the amount of \$694.08. (The statement in the opinion of the District Court (appendix) to the effect that the petition asked for the *return* of the automobile only, is incorrect. See prayer of petition (R5).)

Subsequent to the filing of this petition, Belli entered a plea of guilty, and was sentenced to pay a fine.

Thereupon the United States Attorney filed a purported answer (R9) to said intervening petition. This document did not deny or traverse any of the statements or allegations of the petition. On the contrary, it contained merely a statement, which if true, would establish the guilt of Belli of illegally transporting intoxicating liquor; but, it in nowise

alleged any guilt or guilty knowledge on the part of petitioner, Oakland Motor Car Company.

At no stage in the proceedings in the District Court was there any attempt by the Government, by pleadings, by affidavits, by the introduction of testimony, or otherwise, to show any guilt, possession of guilty knowledge or fault of any character on the part of the petitioner, Oakland Motor Car Company.

The said intervening petition and its accompanying affidavit, together with the purported answer of the Government thereto, was submitted to the District Court, and on April 14th, 1923, the Court made an order denying the prayer of the intervening petitioner for the return of said automobile and refusing to establish any lien in favor of the intervening petitioner upon the proceeds to be derived from the sale of said automobile.

ARGUMENT

1. Nothing to be found in the laws of California demands a disposition of causes of this character different from that made in other jurisdictions.

In the case of *United States vs. Sylvester*, 273 Fed. 253, the United States District Court for Connecticut, in a case similar in all respects to the instant one, says:

“What, then, is to become of the interest of the conditional vendor or the interest of the mortgagee? Are such persons to lose their interest in the vehicle or the value of their property right? The answer is a negative one, and is found in the provisions of Section 26, which guard against such loss, as far as possible.”

The pertinent provision of Section 26 of the National Prohibition Act are as follows:

“Whenever intoxicating liquors transported * * * illegally shall be seized by an officer he shall take possession of the * * * automobile * * * and shall arrest the person in charge thereof. * * * The court, upon conviction of the person so arrested shall order the liquor destroyed, *and unless good cause to the contrary is shown by the owner*, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which

are established, by intervention or otherwise, at said hearing or in other proceedings brought for said purpose, as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor.”

The District Court for Connecticut, in applying the provisions of the statute follows the well-established rule of giving effect to *the whole*. It recognizes that the law intends to protect innocent persons from unnecessary and unjust loss, and recognizes that the vendor under a conditional sales contract, as well as the mortgagee, is entitled to protection, as, indeed, the very letter of the law provides.

The District Court in the instant case cites six California decisions which hold, in effect at least, that the vendor in a contract of conditional sale is the owner of the chattel sold until all the terms of the contract to be performed by the vendee are fulfilled—and, the Court says:

“It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government.

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof."

From which it may be fairly inferred that the District Court is of the opinion that the status assigned by state laws to a vendor under a conditional sales contract may govern his rights under Section 26 of the National Prohibition Act, and that he might have rights to protection in some jurisdictions, whereas he has none in others.

We are well aware that the decision of the Court in *United States vs. Sylvester* is not binding upon the District Court of California, but it should have sufficient persuasive weight to warrant the inquiry whether a difference in State laws justifies two diametrically opposing decisions in similar circumstances by courts of the same judicial system. The examination can perhaps be most quickly made by setting out a few of the chief characteristics of conditional sales contracts and the propositions of law applicable.

a. The validity of conditional sales contracts is well settled.

b. The nature of the contract is to be determined by all its terms—calling it a "lease", a "mortgage", etc., does not affect its character.

c. Title to thing sold remains in vendor until vendee has complied with terms of contract. Vendor in meanwhile is the owner of the chattel.

d. Upon breach of vendee, vendor has two remedies—he may repossess the chattel or sue for the amount due.

e. Having two remedies, vendor must choose one; he cannot pursue both.

Having set out these few propositions—we do not consider this phase of sufficient importance, as will appear later, to occupy the time of the Court with more—let us see if there is any difference between the laws of California and Connecticut which would warrant the chasm between *United States vs. Sylvester* and this case. *The difference is not to be found.* There is not to be found a distinction in the decisions of the two states. Taking the propositions in the order above given, we have the following paralleling decisions:

- a. *Liver vs. Mills*, 155 Cal. 459;
Greene vs. Carmichael, 24 Cal. App. 27;
Cooley vs. Gillan, et al, 54 Conn. 80.
- b. *The Parke & Lacy Co. vs. The White River Lumber Co.*, 101 Cal. 37;
Kohler & Chase vs. Hayes, 41 Cal. 585;
Miller vs. Steene, 30 Cal. 402;
Hine vs. Roberts, 48 Conn. 267;
Loomis vs. Bragg, 50 Conn. 228;
Bohmann vs. Perrett, 97 Conn. 571.
- c. *Potts Company vs. Benedict*, 156 Cal. 322;
Waltz vs. Silveria, 25 Cal. App. 717;
Henry Lewis, et al vs. McCabe, et al, 49 Conn. 141.

- d. *Holt Mfg. Co. vs. Ewing*, 109 Cal. 353;
Muncy vs. Brain, 158 Cal. 300;
Adams vs. Anthony, 178 Cal. 158;
Appleton vs. Norwalk, etc., 53 Conn. 4;
Crompton vs. Beach, 62 Conn. 25;
Alfred Fox Piano Co. vs. Bennett, 96 Conn.
 448.
- e. *Parke & Lacy Co. vs. White River Lumber
 Co.*, *supra*;
Holt Mfg. Co. vs. Ewing, *supra*;
Muncy vs. Brain, *supra*;
Hughes vs. Kelly, 40 Conn. 148;
Griffin vs. Ferris, 76 Conn. 221.

As there exists no difference between the law relating to conditional sales contracts in California and Connecticut, the decisions in *United States vs. Sylvester* and that in the case at bar cannot be reconciled on that score. In fact, we do not believe that they can be composed at all, and it is our view that the quotation above from the *Sylvester* decision is the correct interpretation of Section 26 of the National Prohibition Act, and expresses the intent of the Congress that enacted it, and that the decision in this case does not. The conclusion is forced upon us in small part only by what we have disclosed as to the laws of the respective states, and which would be found in comparison of the laws of almost any other states, but mainly by what appears to us to be

more pertinent features of the case, to which we will now pass.

2. State laws do not constitute a rule of decision in causes of this nature, nor can the status of a party or his rights in such cause be defined by reference to state laws.

Section 721, Revised Statutes;

Section 1538, Compiled Statutes.

“The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”

This is also the language of Section 34, Chapter 20 of the Act of September 24th, 1789, and it is therefore, the statute that was under consideration in *Swift vs. Tyson*, 16 Peters 1 and *Bucher vs. Cheshire R. R. Co.*, 125 U. S. 610, and the numerous decisions intermediate of the two and subsequent to the last mentioned case.

Some jurists have observed that these decisions are not always harmonious. Be that as it may, we think that whatever want of accord may exist relates to governing force of State laws in actions at common law, and that it has never been held that State laws form rules of decision in Federal Courts in the interpretation of statutes of the United States, in equity or in criminal prosecutions.

This cause is not an action at common law. It is an appeal for equitable relief in a proceeding authorized by a statute of the United States.

Federal statutes must be interpreted by Federal Courts, irrespective of State decisions.

Calhoun Gold Mining Co. vs. Ajax Gold Mining Co., 182 U. S. 499;

West Virginia vs. Adams Express Co., 219 Fed. 794.

In *Calhoun Gold Mining Co. vs. Ajax Gold Mining Co., supra*, the Supreme Court says in refusing to give countenance to a decision of the Supreme Court of Colorado:

“There is serious objection to accepting the consequence as determinative of our judgment. We might by so doing confirm titles in Colorado, but we might disturb them elsewhere. The statute construed is a Federal one, being a law not for Colorado, but for all the mining States, and, therefore, a law for all, not a rule for one, must be declared * * * The court must interpret the statute independently of local considerations.”

The National Prohibition Act is a law for all the states. By every reason, it must be interpreted independently of local State laws.

State laws are not regarded in suits in equity in Federal Courts.

Neves vs. Scott, 13 How. 268;

Russell vs. Southard, 12 How. 139;

Boston, etc. vs. Slocum, 77 Fed. 345;
Butler et al vs. Douglass, 3 Fed. 612;
Johnston vs. Roe, 1 Fed. 692.

State laws do not constitute a rule of decision in criminal prosecutions in United States Courts.

Bucher vs. Cheshire R. R. Co., *supra*;
U. S. vs. Reid, 12 How. 361;
U. S. vs. Hall, 53 Fed. 352;
Logan vs. U. S., 144 U. S., 302;
U. S. vs. Jones, 10 Fed. 469.

Therefore, if the view should be taken that the proceeding instituted by petitioner in the District Court was part of a criminal prosecution, State laws could not be resorted to to determine petitioner's status or classification nor any rights or disabilities which it may have in that proceeding.

3. If a law is capable of more than one interpretation, Federal Courts will select that construction which is most equitable and just.

It has been seen that two very different interpretations of the same section (Section 26) of the National Prohibition Act have been indulged in by judges of two United States District Courts. We think it has been made to appear that this difference is in nowise called for or compelled by any controlling force which local State laws may exercise upon the decision of Federal Courts in causes of this character. Plainly, the Federal Courts are left in an en-

tirely independent position as regards state influence in interpreting and applying the provisions of a Federal statute.

Assuming that the statute is capable of more than one interpretation, which shall it be—one that seeks in the words of the written law authority to deal justly with the innocent, to protect such persons in their property rights and prevent unnecessary loss to them so far as may be, or, one that by strained construction, by disregard of the language of the statute, by unwarranted assumptions as to the legislative intent, attempts not to deal as justly as may be with the innocent, but hands out forfeiture, confiscation and causes unnecessary and destruction loss to those who are guilty of no more than having been engaged in a very large and important business in this country, and having employed in that business methods long sanctioned by the laws of every State in this nation?

The instruments to choose from are ready made in the decision of *United States vs. Sylvester, supra*, and in the decision in this case in the Court below as well as the decision of the United States District Court for Arizona in the case of *United States vs. Marshall Montgomery*, designated upon the records of that Court as C-448.

The Montgomery case appears to have largely influenced the decision of the Court below, for it quotes from it and approves the following language:

“It is not unreasonable to suppose that Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

The quoted language was used by the District Court for Arizona in deciding a case similar to this, so the “owner” referred to is, as is the petitioner here, the vendor under a conditional sales contract.

With the conclusions of the Court we respectfully but very decidedly differ.

It is unreasonable to suppose that the Congress in enacting Section 26 of the National Prohibition Act, which deals largely with the subject of vehicles used in the illegal transportation of liquor, was entirely ignorant of the business methods of one of the country's largest industries—the automotive industry. It is unreasonable to suppose that the Congress was entirely ignorant of the fact that conditional sales contracts are largely employed in the sale of automobiles—that probably one-half, or more, of all automobile sales were effected upon such contracts. It is unreasonable to suppose that Congress was entirely ignorant of the characteristics of a business instrument such as the conditional sales contract, which is so extensively used not only in the automotive industry, but which has been used for half a century or more in almost unenumerable other industries in this country. It is unreasonable to sup-

pose that Congress did not know that the chief office of the conditional sales contract, like the chattel mortgage, was to secure the vendor in the collection of the balance due upon the purchase price of the article sold. It is unreasonable to assume that the Congress did not know that upon the execution of such a contract, the vendor delivered the article sold into the possession of the vendee, and that from that time on the vendor had no more control or right of control over the chattel than a mortgagee under a properly worded chattel mortgage would have.

Upon a breach of a conditional sale contract, by the vendee, the vendor may repossess the chattel or sue for the balance due. Upon the breach of the conditions of a chattel mortgage, the mortgagee may take possession of the chattel covered by the mortgage, or he may sue for the amount due. The only difference in the position of the two parties is that if the conditional sales vendor repossess the property, it is his without further procedure, because he has never parted with the title, whereas the mortgagee must foreclose the mortgagor's interest in the property before he can obtain title. *A mere difference in procedure after breach by the vendee, but no difference in the amount or degree of control of the property that may be exercised by the vendor or mortgagee before any breach occurs.*

It is unreasonable to suppose that the Congress was ignorant of this situation.

It is unreasonable to suppose that the Congress, knowing the similarity in interests between those of conditional sales vendor and chattel mortgages, would take pains to protect the interests of the latter and leave those of the conditional sales vendor—by far the more numerous class—subject to forfeiture and confiscation without hope of redress.

In the decision in the Montgomery case, above referred to, the Court also says:

“I am, therefore, of the opinion that an owner while retaining title in himself delivers a car on conditional sale with power to use it in any way that the buyer may desire cannot escape a forfeiture if the buyer uses it unlawfully, by claiming that such unlawful use was without his knowledge.”

We contend that this conclusion is contrary not only to the intent, but to the very language of the National Prohibition Act. By Section 26 of the Act the Court “shall order the vehicle to be sold, *unless good cause to the contrary is shown by the owner.*”

An owner, among laymen as well as lawyers, is considered to be, according to this country’s best known lexicographer—Webster:

“One who has the legal or rightful title, whether he is in the possession or not.”

Unless the contrary appear—and it does not appear in the case of Section 26—that words are used

in a different meaning, their ordinarily accepted meaning must be accorded them.

Therefore, from the well-understood meaning of the word "owner", as well as the knowledge that the Congress must have had of the characteristics of conditional sales, and from the context of the section itself, it is plain that the "owner" referred to in Section 26 of the National Prohibition Act is not restricted to an owner in possession, *but to an owner in the fullest meaning that our language accords to the word.*

Manifestly the statute cannot refer to an owner in actual possession. In that case he would be the person guilty of illegally transporting liquor, and he could show no cause whatsoever why the vehicle should not be confiscated. It is impossible to suppose that the Congress intended to provide for such a burlesque situation.

If it means an owner who has voluntarily parted with possession of the vehicle—such as lent it—he cannot, during the duration of the loan, exercise any more actual control over the use and movements of the vehicle than can the conditional sales vendor. If he accompanies the vehicle and controls its use, and it is employed to illegally transport liquor, the owner is a co-defendant, and in no better position to show "good cause" than if he had been operating alone.

If the Court's conclusions are to be accepted, it would restrict the "owner" who can show "good

“cause” to one from whom the vehicle has been stolen and then used for the illegal transportation of liquor, which is to assume that the Congress took pains to protect a few isolated owners to whom such a contingency might happen, and left the thousands of conditional sales vendors to the “mercy” of confiscation, and in the very same section of the Act provided protection for the interests of the mortgagee.

The fact that the “owner”—the conditional sales vendor—may sue the vendee for the balance due, is not an answer to our contention, nor should it favorably address itself to the conscience of the Court.

The statute gives to the owner a remedy to which he is entitled. This cannot be taken away on the ground that he can recover judgment against the vendee for the amount still unpaid.

Conditional sales contracts are exacted from purchasers of automobiles because they either have not the means to pay, at one time, the entire purchase price, or their property is in such condition that they are not considered sufficiently solvent for an open credit. A money judgment against many of these vendees would be worthless. Such a judgment against those who have become so shiftless and reckless as to engage in illicit liquor traffic would in almost every instance be so. If it had been the intention of the lawmakers that this should be the only remedy of the conditional sales vendor, why was any provision made to protect the chattel mortgagee? He also can sue upon his note. It is incon-

ceivable that two men in practically the same situation should be so differently dealt with—one of them so unjustly.

It is our contention that such restricted application is unwarranted; that it ignores the meaning of the statute; that it is not in accord with the manifest intent of its framers and that it violates the principles of statutory construction enunciated by our Courts.

4. The District Court, in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms, and has employed standards of interpretation that are contrary to the rules of construction employed by Federal Courts.

“Of two constructions of a public law, both fairly possible, courts of law will adopt that which equity would favor.”

Washington R. R. vs. Coeur D’Alene Ry.,
160 U. S. 101.

As a matter of fact, Section 26, National Prohibition Act, in so far as it relates to the protection of an owner, in possession or out of possession, of a vehicle seized does not admit of two constructions. It is plain that he is to be protected upon “good cause” being shown; but, for the purpose of this argument, let us assume that either one of two constructions is fairly possible. One construction would be that upon the owner showing good cause, he is

entitled to relief from the seizure of his property; the other is that while the right to relief, in these circumstances is plainly indicated, no specific procedure has been provided, as in the case of the lienor, and consequently the owner is without remedy and he must suffer a total loss of his property.

Need we hesitate for a moment as to which construction equity would adopt? Had it been the practice of equity to hesitate in situations of this sort, our equity jurisprudence would either never have been written or it would convey doctrines far different from those that prevail.

In such a case, the right having been indicated, equity *would find* a remedy—a procedure. Moreover, if its hands were not tied by statutory enactments, in a case of this kind, equity would declare the existence of the right as well as apply the remedy.

The District Court has ignored this principle in deciding the instant cause:

Where the language of a statute is clear, the statute is not open to construction.

Yerke vs. U. S., 173 U. S. 442;

Hamilton vs. Rathbone, 175 U. S. 419.

The National Prohibition Act is plain in that an owner of a seized vehicle who shows good cause is entitled to protection against confiscation of his property. To hold otherwise is to ignore the plain language of the statute.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, *avoid an unjust or absurd conclusion.*

In re Chapman, 166 U. S. 667;

Law Ow Bew vs. U. S., 144 U. S. 59;

Sioux City R. R. vs. U. S., 159 U. S. 360;

U. S. vs. Kirby, 7 Wall. 486.

(We use the word "sensible" as employed in the decisions; no offensive meaning is to be implied.)

A sensible construction of Section 26, National Prohibition Act, could but lead to the conclusion that it was the legislative intention to prevent the vehicle of an owner who "shows good cause" from being confiscated, without granting such owner any redress whatsoever. A sensible construction of said Act would give effect to the legislative intention to give such owner a remedy in the premises besides his right to sue a very probably insolvent debtor who had turned a criminal. A sensible construction of said statute would have resulted in avoiding the unjust conclusion that an innocent person who shows good cause, as provided by the statute, shall be punished without redress. A sensible construction of said statute would have avoided the absurd conclusion that while the Congress had provided for the protection of an innocent owner, he was not entitled to such protection because the Congress had failed to prescribe minute details of procedure, but instead had seen fit to give the Court a free hand in

dispensing justice to the owner in proportion to the good cause shown.

Where a particular construction of a statute will work injustice or occasion great inconveniences, it is to be avoided in favor of another and more reasonable construction possible.

Knowlton vs. Moore, 178 U. S. 77.

The particular construction of the National Prohibition Act, adopted by the District Court in this cause, worked great injustice. Another and more reasonable construction was possible—the opportunity was and is provided by the language of the statute itself.

No statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable.

U. S. vs. Tappan, 11 Wheat. 426;

The Palmyra, 12 Wheat. 15.

The National Prohibition Act prescribes relief for *all owners* of seized vehicles who show good cause. The decision in the instant case renders nugatory this provision, save, *possibly*, to an extremely limited class of owners, but renders the property of the vast majority of innocent owners likely to become involved in cases of this character subject to confiscation without redress. As to practicability, the decision goes further and shuts the door upon all solutions, practical or impractical.

“Effect should be given to all the provisions of a statute.”

Rhodes vs. Iowa, 170 U. S. 422;

Bernier vs. Bernier, 147 U. S. 246;

Beley vs. Naphtaly, 169 U. S. 361;

Rice vs. The Minn., etc. R. R. Co., 1 Black 378;

Platt vs. Union Pacific R. R., 99 U. S. 58.

Where a statute covers *all* of a class, and a decision limits its application to but a small number of that class, eliminating the majority from participation in the relief provided, *it does not give effect to all the provisions of a statute*. A statute that employs the word “owner” without qualification, embraces all persons whom the word, in the broadest generally accepted meaning of our language includes. The meaning so given to the word “owner” includes an owner out of possession (such as a conditional sales vendor) as well as an owner in possession. The decision in this case eliminates from the provisions of the statute conditional sales vendors out of possession of their property.

It is the duty of the Court to give effect to every word in a statute if it can be done without violating the intention of the legislature.

U. S. vs. Gooding, 12 Wheat. 477;

Bend vs. Hoyt, 13 Peters 272;

Market Co. vs. Hoffman, 101 U. S. 115.

The decision of the District Court in the instant case does not give effect to every word in the statute

in that it restricts the meaning of an unrestricted word when no legislative intention to do so is apparent. In fact the legislative intention is violated by such restriction, as the intent appears that the word "owner" is employed without qualification.

Every word of a statute must, if possible, be given some effect; nothing is to be stricken out if it can be avoided; it is not to be presumed that the legislature intended any part to be without meaning.

Allen vs. Louisiana, 103 U. S. 84;

U. S. vs. Temple, 105 U. S. 99;

Montclair vs. Ramsdell, 107 U. S. 152;

U. S. vs. Fisher, 109 U. S. 145;

Murphy vs. U. Her., 186 U. S. 111.

It was possible in this case to give effect to the language of the National Prohibition Act, providing that when an owner shows good cause his seized vehicle shall not be sold. The District Court refused to give any effect to that provision. Ignoring the provision has the effect of striking it out of the statute. The decision in this case renders meaningless that portion of the Act which provides that upon the owner showing good cause his seized vehicle shall not be sold.

5. Suggestions regarding protection of interests of conditional sales vendors.

By the foregoing we trust that we have shown that the conditional sales vendor, in circumstances such

as are presented by this case, has rights of property which are recognized and safeguarded by the provisions of the National Prohibition Act.

How are such interests to be cared for?

The District Court for Arizona, in its decision in the *Marshall Montgomery* case, says that "the difference between the provisions applicable to owners and those applicable to lienors is 'significant'."

The "significant" circumstances to which the Court refers seem to have appeared to it sinister, to have played an important role in arriving at the decision rendered.

It requires only a fair consideration of the provisions of Section 26, however, to show that there is nothing either "significant" or sinister in the fact that as to the "owner", the section makes no specific provisions as to what action the Court shall take, when he, the owner, has shown "good cause".

No doubt the framers of the law had in mind that an "owner", whether he be an owner in possession or one out of possession, such as a conditional sales vendor, has full title, and if the vehicle is returned to him, *there is nothing more to do*. No elaborate procedure need be prescribed.

Why should a Court accustomed to equity causes consider itself helpless when authorized by statute to deal justly with persons before it, merely because the statute does not point out in minute detail the

procedure that should be followed. Had the statute, in addition to declaring the right also prescribed the relief and the procedure in its administration, the Court would be limited by those provisions; but, as the right is declared without limiting provisions as to procedure, it would appear that the proper course for the Court to pursue would be to dispose of the matter presented as the "good cause shown" requires.

In most cases of intervention by a conditional sales vendor, the proper relief, we feel, would be to order the vehicle returned to such vendor.

The absence of procedure provisions as to an intervening "owner" and their presence in the case of an intervening mortgagee or other lienor, under the provisions of Section 26 of the National Prohibition Act, is not "significant" in the sense that it deprives the former of all or any rights to relief and grants such rights to the latter class. As we have said, a return of the vehicle to the "owner" is as full relief as he may expect, and pursuing such course is beset with no complications. The intervening owner already is clothed with title, and when the vehicle is returned to him he receives only that which he already owns.

Such is not the situation of the intervening lienor. It may be true that a chattel mortgagee, upon breach of terms of the mortgage by the mortgagor, may take possession of the mortgaged property, but this

is only for the purpose of better preserving his security.

Taking possession of the property does not vest title in the mortgagee. There remains still the interest of the mortgagor, which must be extinguished by foreclosure before the mortgagee can acquire title to the property as "owner".

Manifestly then, the Court could not, in an intervention by a mortgagee or other lienor under the provisions of Section 26, order the seized vehicle turned over to the intervenor. He has no title to it—*he is not the owner*—and he has but an interest in the property as security for the payment of the amount due him. To realize that amount the property may be sold. At the sale the mortgagee may buy it in for the amount of his claim and thus acquire title, but the sale must be had.

The framers of the National Prohibition Act substituted a sale of the mortgaged vehicle under procedure prescribed by the Act for foreclosure proceedings in accordance with State laws and the provisions of the mortgage. The reason is easily found. If a surplus remains out of the proceeds of the sale, after all *bona fide* liens have been paid, that surplus represents the defendant's interest in the property, which interest is confiscated by the Government.

In the case of *United States vs. Sylvester, supra*, the Court states the following conclusion respect-

ing the interpretation of Section 26 of the National Prohibition Act.

“Fourth—A *bona fide* vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his *bona fide* lien, as far as possible.”

The Court classes the vendor with the mortgagee, both as lienors, for the reason, expressed elsewhere in the decision, that:

“Seventh—In the fourth instance, after the *bona fide* lien and lack of notice or knowledge have been established, the vehicle should be sold at public auction, and after the costs, as provided by law, have been paid, the United States Marshal shall then pay, if possible, the amount of the *bona fide* lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States.

“(5) To grant this petition (a petition by a conditional sales vendor for return of a truck) would permit a lienor or mortgagee to profit by the transactions, and that result was never intended by the framers of the law. Cases may arise where the application of this rule would result in realizing an insufficient amount at the sale to pay the full amount of the *bona fide* lien; but where a substantial amount has already been paid, as here, on a new truck, undoubtedly the full amount of the balance due, plus the

costs, will be realized, so that the lienor will be fully protected.

“(6) Where, however, the amount paid by the purchaser is small in proportion to the purchase price, so that a large amount will have to be realized by the United States Marshal at the sale, and where the highest bid is insufficient to meet the costs and the amount of the *bona fide* lien, the United States Marshal shall then abandon the sale and report the facts to the Court for further instructions.”

We have no inclination to quarrel with the above decision in any respect. The Court is too apparently striving to apply the law justly and to protect the interests of all concerned for us to assume a critical attitude. And the circumstances of the case before the Court perhaps fully warranted all the conclusions reached.

We think, however, that the Court has over-estimated the probability of more than the amount of the lien being realized at the sale.

The value of the automotive vehicles is affected largely by temperamental considerations. This is particularly true of non-commercial vehicles—so-called “pleasure cars”;—a car that has been used is a “*second-hand*” car. No matter for how short a time it has been used, or how slightly it has been used, it is “*second-hand*”, and its value, as compared with a new car, is greatly diminished. Then there is the matter of “Model”. An automobile of 1922

Model is worth much less in 1923 than a Model of that year, although the 1922 Model car may never have been used. Perhaps the decline in value is not in proportion with the drop in that of a woman's hat or gown of last year's "style", but the phenomenon will help us to understand.

When actual use of an automobile is added to age the result in value reduction is startling. More startling yet is the diminution when the usage has been rough.

Those who decide to engage in the illicit liquor traffic are not likely to be gentle persons, and their treatment of things entrusted to them is not calculated to enhance their value.

In practice, what we are most likely to find in cases of this character is that the vehicle seized is dirty, dented, scratched, its outer parts and accessories broken, top in tatters, paint or enamel rubbed off, and not infrequently the engine and other mechanism damaged.

Such a vehicle, at forced sale in the same condition as when seized, will bring very little as a purchase price. It would have to be a very exceptional case where the amount realized would equal the balance due the conditional sales vendor.

On the other hand, if the vehicle is returned to the vendor and by him overhauled and rehabilitated and it is placed on the market for sale in the ordinary course of trade, the vendor may eventually

realize the balance due him—at least he will come nearer to it than he would from any proceeds derived from a Marshal's sale.

Whenever a vehicle is sold by the Marshal for an amount less than sufficient to defray the costs, as provided by law, and the vendor's claim, there is no defendant's interest to confiscate and the Government gains nothing—and in almost every instance the amount realized will be insufficient to meet both the costs and the vendor's claim, *and the vendor is the loser.*

In *United States vs. Brockley*, 266 Fed. 1001—a case where the petitioners for the return of an automobile seized under the provisions of Section 26, National Prohibition Act, showed that they had lent the automobile to the defendant without any knowledge that it was to be used or that the defendant intended to use it for the illegal transportation of liquor—the Court says:

“Whether the property seized shall be confiscated and sold depends upon the facts appearing and whether the facts presented constitute good cause or reason to the contrary is a question addressed to the *judicial sense* and judgment of the Court. This provision in the act is not analogous, as was contended for by the Government's attorney, to that found in Section 3450 of the Revised Statutes (Comp. St. Sec. 6352) under which it has been held that the ignorance of the owner of a vehicle used by a

third person for the removal of goods with the intent to defraud the United States, will not save his property from confiscation. * * * From these cases, as well as from the general provisions of the revenue laws therein construed, it is conclusive that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture absolutely, whether or not good cause appear to the contrary."

"The admitted facts in this case show ownership and want of knowledge on the part of the vehicle's owners as to the purpose for which the vehicle was to be employed. *Without any other attending circumstance, this is sufficient to warrant the Court to order its return.* It might be otherwise if, from the reputation of the person intrusted with the vehicle or other circumstances attending his occupation or employment, the inference might arise that the owners had reason to suspect that their property might be used for the purpose it was employed."

"The construction contended for by the learned representative of the Government would admit of no reason or cause for the return of property used in connection with a violation of the provisions of this statute, if such was intrusted to the violator of the same and used in connection therewith. *This would work greater hardship upon innocent owners of such property than was contemplated by the legislators; otherwise they would not have provided for the return on good cause shown.* (Italics ours.)

“The order formerly entered is vacated, and the property seized, one Hudson touring car No. 632-971, *is to be delivered to the petitioners*, when storage and charges, if any, are paid by the owners.”

In *McDowell vs. United States*, No. 3865, recently decided by this Court, it was held that Section 3450 Revised Statutes, had been repealed by the enactment of the National Prohibition Act, and that the harsh conditions of confiscation provided by Section 3450 no longer applied in a case such as that now at bar.

Notwithstanding this and notwithstanding decisions in Federal Courts of other jurisdictions, showing an inclination to apply the milder and more just provisions of the National Prohibition Act to cases of this nature, the District Court for Arizona and the District Court for the Northern District of California, in this case, have virtually “re-enacted” Section 3450 in all its serenity. We contend that in so doing the said Courts have gone far beyond their authority.

It will be seen that in interpretation the Court in the *Sylvester* case was in accord with the *Brockley* case—only in the disposition of the vehicle do they differ. In fact, they do not differ so much even in that respect, for it may be fairly implied that in a case which would appear proper to the District Court for Connecticut it would return the vehicle to the owner instead of ordering it sold and the

owner's claim paid from the proceeds of the sale. They are one, however, on the proposition that an owner who voluntarily parts with possession of his property, which is afterward without his knowledge used for the illegal transportation of liquor, has a right to protection, and that his vehicle cannot be confiscated upon good cause being shown.

As we have already indicated, we think that a return of the vehicle to the owner, in such circumstances, is the course most likely to promote practical justice, and we urge that the practice be approved.

In the Brockley case, the owners were out of possession of the automobile when it was used for the illegal transportation of liquor, because they had *lent* it. We do not think that, for a case such as this, they were in a materially different position from an owner who has parted with possession under a conditional sales contract—only that if any inferences as to innocence and want of knowledge on the part of the owner is to be indulged in, it favors the conditional sales vendor.

One who lends so valuable a chattel as an automobile to another, without pay, must know him fairly well, and there is consequently more reason to suspect that the lender has a more intimate knowledge of the borrower's character and business than could be expected from a conditional sales vendor as to his vendee, and for that reason the equities in favor

of a conditional sales vendor are even greater than those of a lender.

Our view is that the framers of the National Prohibition Act intended to give the Court a free hand in all cases where an "owner" has shown "good cause" to deal with the situation as the circumstances warrant and that, therefore, it is unnecessary to lay down any rigid rule which must be adhered to in every case. We feel that if the Court is satisfied that nothing above the costs and the vendor's claim will be realized by a sale, the Court may return the vehicle to the vendor. If it is apparent that enough will not be realized from such sale to meet these two items, then the Court should order the vehicle returned to the vendor upon his paying the costs. If a case arises where it is likely that more will be realized than the aggregate of costs and the vendor's claim, then the rule laid down in *United States vs. Sylvester* would, no doubt, be the one to follow. The Court is not bound by the provisions of State laws prescribing the status, rights and obligations of parties to conditional sales contracts, in proceedings of this character, but it may look beyond the mere words of the instrument and construe the status of the claimant as a lienor instead of an owner.

CONCLUSION

We earnestly ask for the following conclusions in this case:

1. That there is no provision in the laws of California that renders a decision in this case different from decisions in similar cases in other jurisdictions necessary or proper.

2. That State laws have no governing force in determining the status or the rights of the petitioner in this case.

3. That the District Court has misinterpreted the National Prohibition Act and the rights granted by it to petitioner, when determining this cause.

4. That the District Court in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms and has employed standards of interpretation that are contrary to the rules of interpretation employed by Federal Courts.

5. That as to owners of seized vehicles the Court is vested with discretion as to procedure to attain the objects of the National Prohibition Act in that respect and that it is the object of said Act to protect innocent vendors from loss as far as possible and that Courts should act with that end in view.

And, as a consequence of said conclusions, we respectfully request that this Court annul and overrule the order heretofore made and entered in this cause

by the United States District Court for the Northern District of California, on April 14th, 1923, and that this Court grant the prayer of the petitioner for the return to it of the personal property described in its petition herein; or, if this Court be of the opinion that a return of said property is not the proper relief to be granted the petitioner, then that this Court order that petitioner have a lien upon the proceeds derived from the sale of said property to the amount due under its contract of conditional sale and that said amount be paid to petitioner, after deducting from the amount realized from the sale of said property the costs, as provided by law, and that in the event the remaining sum, after deducting said costs, be not sufficient to pay petitioner's claim in full, then that the whole of said balance, after deducting the costs, as aforesaid, be paid over to the petitioner.

Respectfully submitted

P. R. LUND,

Attorney for Appellant.

San Francisco.....**JUNE**....., 1923.

APPENDIX

In the Southern Division of the United States District Court,
for the Northern District of California.

First Division.

No. 12871.

No. 12188.

No. 12296.

No. 12957.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL, et al,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK MODESTI,
Defendant.

ORDER DENYING MOTION**PARTRIDGE, JOHN S.**

In each of the above entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition Law provides: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile * * * and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall order the liquor destroyed and, unless good cause to the contrary is shown by

the owner, shall order a sale by public auction of the property seized, and the officer making the sale * * * shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor."

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Sylvester*, 275 Fed. 253 allowed a lien for the amount of the unpaid purchase price under what the opinion calls "a conditional bill of sale," although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit "a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law."

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshall Montgomery, et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: "It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have the use of a

to suppose Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession."

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this State that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. Ap. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price.

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States* No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved

was whether *Section 3450* of the Revised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under *Section 3450*, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provision of the Revised Statutes was in effect repealed by *Section 26 of the National Prohibition Act*. It is therefore apparent that unless language is found in *Section 26* which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;
2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

(Endorsed): Filed April 14, 1923.

WALTER B. MALING, *Clerk*.

By C. W. CALBREATH, *Deputy Clerk*.

United States
Circuit Court of Appeals
For the Ninth Circuit.

DE MARTINI MOTOR TRUCK COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Apellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

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U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States
Circuit Court of Appeals
For the Ninth Circuit.

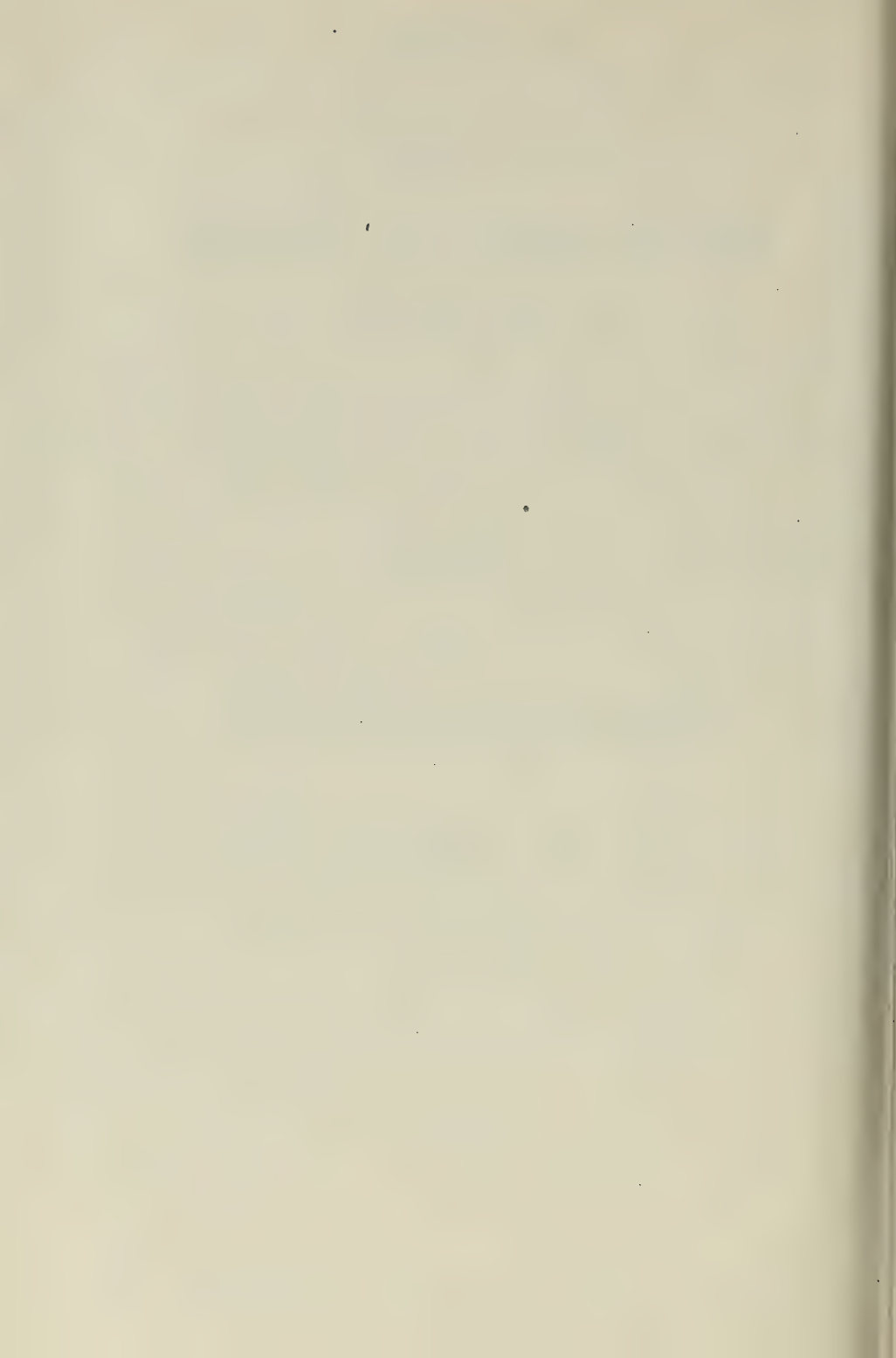
DE MARTINI MOTOR TRUCK COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Apellee.

Transcript of Record.

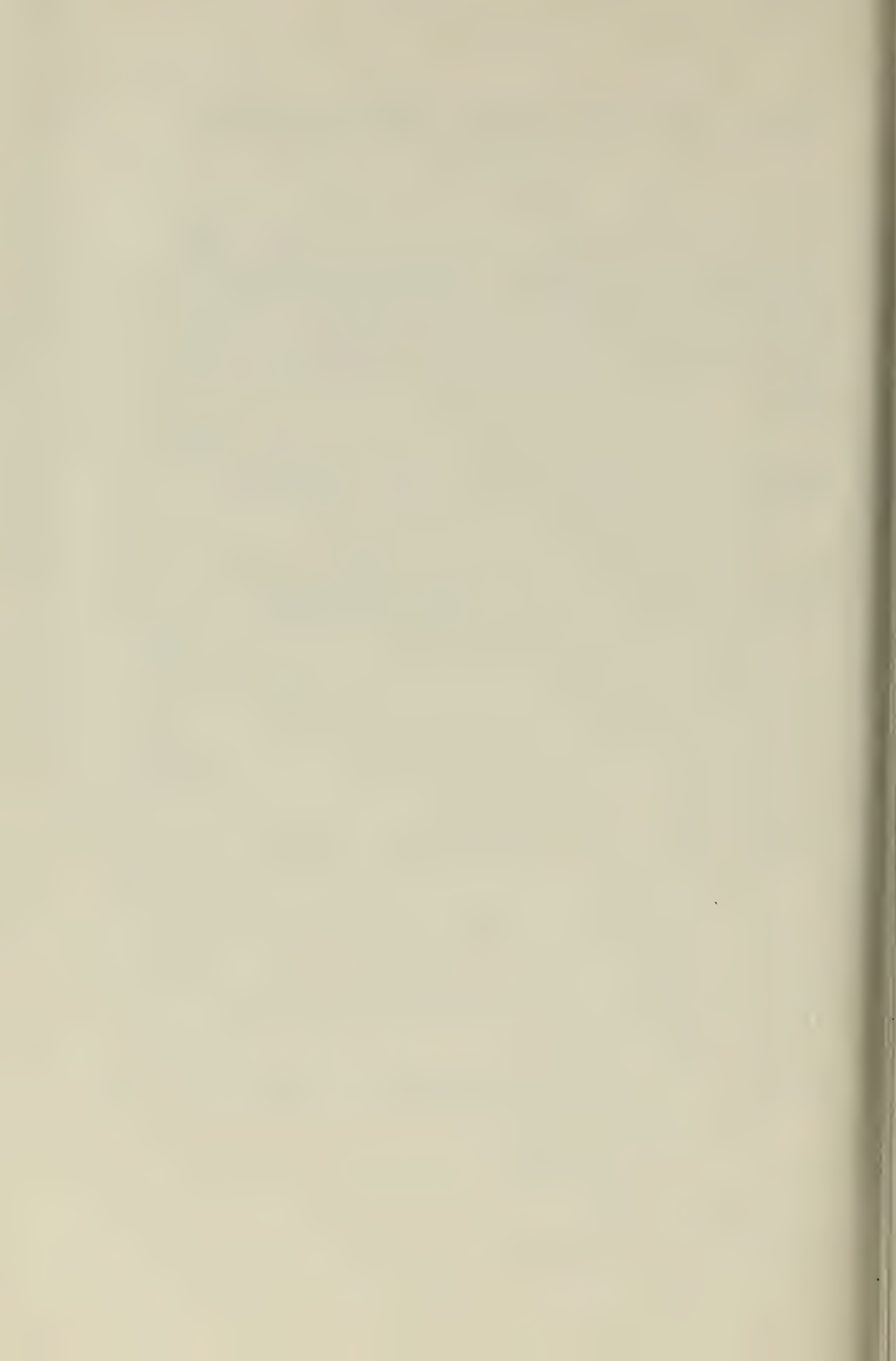
Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

P. R. LUND, Esq., Attorney for Appellant,
San Francisco, Calif.

UNITED STATES ATTORNEY, Attorney for
Appellee, San Francisco, Calif.

In the United States District Court for the North-
ern District of California.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

Praeipice for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make up the record on appeal in the above-entitled cause including therein the following documents on file in your office:

1. Affidavit and petition of De Martini Motor Truck Company for return of 2-ton truck together with Exhibit "A" attached thereto.

2. The answer of the United States of America to said petition together with any exhibits which may be thereto attached.

3. The order of Court made and entered April 14th, 1923, denying the application of said De Martini Motor Truck Company.

4. The petition for appeal.
5. Specification of errors.
6. Order allowing appeal.
7. Undertaking on appeal.
8. Supersedeas order.
9. Citation on appeal.

P. R. LUND,

Solicitor and Counsel for ———.

[Endorsed]: Filed at 10 o'clock and 15 min.
A. M., Apr. 26, 1923. Walter B. Maling, Clerk.
By C. M. Taylor, Deputy Clerk. [1*]

In the United States District Court for the North-
ern District of California, Division One.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

**Affidavit of Guido Braccini and Petition of De Mar-
tini Motor Truck Company (for Return of
Truck).**

State of California,

City and County of San Francisco,—ss.

Guido Braccini, being first duly sworn, deposes
and says:

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

That at all of the times herein mentioned De Martini Motor Truck Company was and now is engaged in the manufacture and sale of motor trucks in the City and County of San Francisco and at all of said times his affiant was and now is the sales-manager of the said De Martini Motor Truck Company and as such sales-manager is fully familiar with the facts below stated and hence makes this affidavit on behalf of said De Martini Motor Truck Company.

That on or about the 4th day of December, 1920, De Martini Motor Truck Company sold and Giuseppe Capacioli purchased from said De Martini Motor Truck Company one 2-ton 1920 Model Truck #192111, Motor No. IU-80566 Motor Truck.

That said sale was evidenced by a certain agreement in writing executed on the 4th day of December, 1920, and that a true copy of said agreement is annexed to this affidavit and [2] made a part thereof for all purposes.

That the purchase price agreed upon between the buyer and the seller for the said motor truck was Thirty-one Hundred and 00/100 (\$3100.00) Dollars, to that Nine Hundred and 00/100 (\$900.00) Dollars was paid at the time of delivery of said truck and subsequently thereto monthly payments upon the balance due, were made so that at this time there remains due from the said Guiseppe Capacioli to De Martini Motor Truck Company on account of the said balance of said purchase price the sum of Six Hundred Thirty-one and 79/100 (\$631.79) Dollars.

That under the terms of said contract the legal title to said motor truck remains in the De Martini Motor Truck Company until the full purchase price of Thirty-one Hundred and 00/100 (\$3100.00) Dollars has been paid.

That affiant is informed and believes that the said Guiseppe Capacioli, the defendant herein, has no property or assets of record in the City and County of San Francisco upon which an execution could be levied.

That one of the provisions of said contract of sale is that the purchaser shall not at any time permit the said motor truck to be removed from his possession or to permit any adverse claim of any character against the same, and not to operate the same contrary to law.

That affiant is informed and believes and on such information and belief states that in the month of October, 1922, in the City and County of San Francisco, State of California, the said defendant, Guiseppe Capacioli, was arrested and the said 2-ton truck was seized for the alleged unlawful transportation of intoxicating liquor in violation of the so-called National Prohibition Act and that the said 2-ton truck is now in the possession and custody of the United States Prohibition Enforcement [3] Officer at San Francisco, California, and that said 2-ton truck is subjected to the further order of this Court.

Affiant further states that at the time said 2-ton truck was entrusted to the care and custody of Guiseppe Capacioli, defendant herein, this affiant had

no knowledge or information nor has said affiant had any notice or information or suspected that said Guiseppe Capacioli since said time intended to use or was using said 2-ton truck in unlawfully transporting intoxicating liquor.

GUIDO BRACCINI.

Subscribed and sworn to before me this 23d day of December, 1922.

[Seal]

THOMAS S. BURNES,

Notary Public in and for the City and County of San Francisco, State of California.

**Petition of De Martini Motor Truck Company for
Return of Truck.**

Wherefore your petitioner, De Martini Motor Truck Company, prays for an order of this Court restoring and surrendering to it the said 2-ton truck in accordance with the provisions of said contract of sale hereto annexed, because of the breach by the purchaser of one of the essential conditions of said contract; or if the said 2-ton truck is not so restored and surrendered to your petitioner but the same be sold in the manner provided by law that in that event, the amount due your petitioner be paid in full out of the moneys realized from said sale, unless the amount paid for said 2-ton truck at the time of said sale be less than the amount of the lien of your petitioner, Six Hundred Thirty-one and 79/100 (\$631.79) Dollars, in which event your

petitioner prays that the said 2-ton truck be returned to your [4] petitioner.

P. R. LUND,

Attorney for Petitioner,

No. 444 California Street,

San Francisco, California.

[Endorsed]: Filed Dec. 27, 1922. Walter B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[5]

SELLING AGREEMENT AND GUARANTEE.

FOR VALUE RECEIVED, the undersigned hereby sell, convey and transfer to

his, its or their right, title and interest in and to the within description, the property therein described and all
moneys to become due hereunder and hereby guarantee that the purchase will make prompt payment of all of
said moneys and will fully perform each and every term thereof.

The undersigned hereby declare that

they entered the here within which payments may be made under said agreement, and that

provisions thereof as if they determined that none of the performance of such other terms and

Dated: 19

DE MARTIN MOTON PALMER CO INC.

BY TWO

THREE

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI et al.,

Defendants.

**A swer to Petition of De Martini Motor Truck
Company in the Above-entitled Action.**

Comes now the above-named plaintiff by John T. Williams, as United States Attorney in and for the Northern District of the State of California, acting for and in behalf of said plaintiff, and Samuel F. Rutter, as Federal Prohibition Director in and for the State of California, and for answer to the petition of De Martini Motor Truck Company in the above-entitled action, denies and alleges as follows:

That he has no information or belief sufficient to enable him to answer the allegations in petitioner's petition herein, to wit, that the said petitioner had no knowledge or belief that the said truck, mentioned and described in petitioner's petition was intended to be used or used in the unlawful transportation of intoxicating liquor, and basing his denial upon that ground, denies that the said petitioner had no knowledge or information or suspicion that the defendant in the above-entitled action did not

intend to use or had used and was using said truck in the unlawful transportation of intoxicating liquor;

And further answering, respondent presents the facts and circumstances set out in the affidavit of Vaughn H. De Spain, Federal Prohibition Agent, which said affidavit is hereto attached, [8] made a part hereof, and marked Exhibit "A."

WHEREFORE respondent prays that the petition herein be denied.

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Respondent. [9]

Exhibit "A."

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI et al.,
Defendants.

Affidavit of Vaughn H. De Spain.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Vaughn H. De Spain, being first duly sworn, de-

poses and says: That he is and at all of the times herein mentioned was in the employ of the Government of the United States as Federal Prohibition Agent, and acting as such under the direction of the Federal Prohibition Director of the State of California, to wit, Samuel F. Rutter.

That on the 6th day of October, 1922, affiant in company with other Federal Prohibition Agents, between the hours of four and five o'clock A. M. of said day, observed defendant Guiseppe Capacioli with a truck and loading the same at No. 525 Filbert Street in the City and County of San Francisco, State of California, with intoxicating liquor, to wit, seven barrels of red wine containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes; that after the said intoxicating liquor was loaded upon the truck mentioned and described in petitioner's petition herein, the said Guiseppe Capacioli, with other persons, started to and did drive away in said truck from said place where the said liquor was being loaded to near Filbert and Stockton Streets, in the said City and County, and affiant together [10] with other prohibition agents then and there caused the said automobile with the said liquor therein to be stopped, and then and there arrested the said Guiseppe Capacioli, who was the driver of said truck, together with the other persons who were then and there with him, to wit, A. Parma, F. Chifinti and F. Orlandi, and affiant and the other prohibition agents then and there seized the said truck and said wine, and which said truck and wine are now in the

possession of Samuel F. Rutter, as Federal Prohibition Director for the State of California; that the said Guiseppe Capacioli then and there stated to affiant and the other prohibition agents that the wine belonged to him and that he had hired the truck from one of the other defendants then and there present. That the said Guiseppe Capacioli had not, nor had any other of the defendants, any permit to authorize their possession or transportation of the said intoxicating liquor. Affiant, after the arrest and seizure aforesaid, made investigation respecting the ownership of said wine and ascertained that the said wine had been stolen by the said defendants from a winery, to wit, the place where the said wine was being loaded upon said truck, said winery being under seizure by the Internal Revenue Collector for the First Internal Revenue District of the State of California.

V. H. DE SPAIN.

Subscribed and sworn to before me this 27 day of Jan. 1923.

[Seal]

C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 19, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL et al.,

Defendants.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

Order Denying Motion (for Return of Truck).

PARTRIDGE, JOHN S. [12]

In each of the above-entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition law provides:

“Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile . . . and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall

order the liquor destroyed and, unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale . . . shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor.” [13]

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Silvester*, 273 Fed. 253, allowed a lien for the amount of the unpaid purchase price under what the opinion calls “a conditional bill of sale,” although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit “a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law.”

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshal Montgomery et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: “It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have

the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession."

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this state that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. App. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price: [14]

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States*, No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved was whether Section 3450 of the Revised Statutes had been repealed by the provisions of the

National Prohibition Act. It was clearly recognized that under Section 3450, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provisions of the Revised Statutes was in effect repealed by Section 26 of the National Prohibition Act. It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, and those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:
[15]

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated April 14, 1923.

[Endorsed]: Filed Apr. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[16]

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Petition for Appeal.

To the Honorable JOHN S. PARTRIDGE, District Judge.

The De Martini Motor Truck Company, petitioner herein, feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 14th day of April, A. D. 1923, does hereby appeal from said order and decree to the Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and document upon which said order and decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

P. R. LUND,
Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[17]

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

Assignment of Errors.

Now comes the De Martini Motor Truck Company, petitioner herein, in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree and order made by this Honorable Court on the 14th day of April, 1923.

I.

That the United States District Court for the Northern District of California erred in refusing to render an order and decree pursuant to the pe-

tition of the De Martini Motor Truck Company, filed in the above cause applying for the return to it, the said De Martini Motor Truck Company, of a certain 2-ton truck in said petition described.

II.

That the United States District Court for the Northern District of California erred in refusing to decree that the De Martini Motor Truck Company have a lien, after deducting the cost of seizure and expenses of keeping and sale of the certain 2-ton truck, described in the petition of said De Martini Motor Truck Company filed herein, to the extent of Six Hundred Thirty-one [18] and 79/100 (\$631.79) Dollars.

III.

That the United States District Court for the Northern District of California erred in refusing to decree that the De Martini Motor Truck Company have a lien upon the proceeds of sale of the certain 2-ton truck described in the petition of the said De Martini Motor Truck Company filed herein.

P. R. LUND,

Solicitor and Counsel for Appellant.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[19]

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Order Allowing Appeal.

On motion of P. R. Lund, Esq., solicitor and counsel for the De Martini Motor Truck Company, petitioner herein, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Judicial District from an order and decree heretofore filed and entered herein, be, and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the Ninth Judicial District. It is further ordered that the bond on appeal be fixed in the sum of \$500.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

JOHN S. PARTRIDGE,

Judge.

Dated this 24th day of April, 1923.

[Endorsed]: Filed Apr. 24, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Supersedeas Order.

This cause coming on to be heard the 24th day of April, 1923, upon the application of the appellant for an appeal to the Circuit Court of Appeals for the Ninth Judicial District and said appeal having been allowed, it is ordered that the same shall act as a supersedeas, the said appellant having executed bonds in the sum of \$500.00 as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the Northern District of California until the further order of this court.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[21]

In the United States District Court for the Northern District of California.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation, organized and existing under the laws of the State of New York, and licensed and authorized to conduct a bonding and surety business within and under the laws of the State of California is held, and firmly bound unto the United States of America in the full and just sum of \$500.00 to be paid to the said United States of America; to which payment well and truly to be made, the said Globe Indemnity Company hereby binds itself, its successors and assigns by these presents.

Signed, sealed and executed at San Francisco, California, this 26th day of April, A. D. 1923, on behalf of the Globe Indemnity Company by its attorney-in-fact, thereunto duly authorized.

Whereas, lately at a District Court of the United States for the Northern District of California in the above-entitled cause depending in said Court, an order and decree was rendered against De

Martini Motor Truck Company, petitioner, in intervention in said action, and the said De Martini Motor Truck Company having obtained from said Court, an appeal to reverse the order [22] and decree in the aforesaid intervention and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said De Martini Motor Truck Company shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GLOBE INDEMNITY COMPANY.

(Signed) J. S. ELLIOTT, (Seal)

Attorney-in-fact.

J. S. ELLIOTT.

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Apr. 26, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[23]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 23 pages, numbered from 1 to 23, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of United States of America, vs. Giuseppe Capaccioli et al. De Martini Motor Truck Co. (Claimant of Truck), No. 12,188, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the Attorney for Claimant and Appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eight Dollars and Seventy-five Cents (\$8.75), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of May, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [24]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to UNITED STATES OF AMERICA and to the Honorable JOHN T. WILLIAMS, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein United States of America is plaintiff and Guiseppe Capacioli is defendant and petitioner in intervention De Martini Motor Truck Company, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 26th day of April, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 12,188. United States District Court for the Northern District of California. De

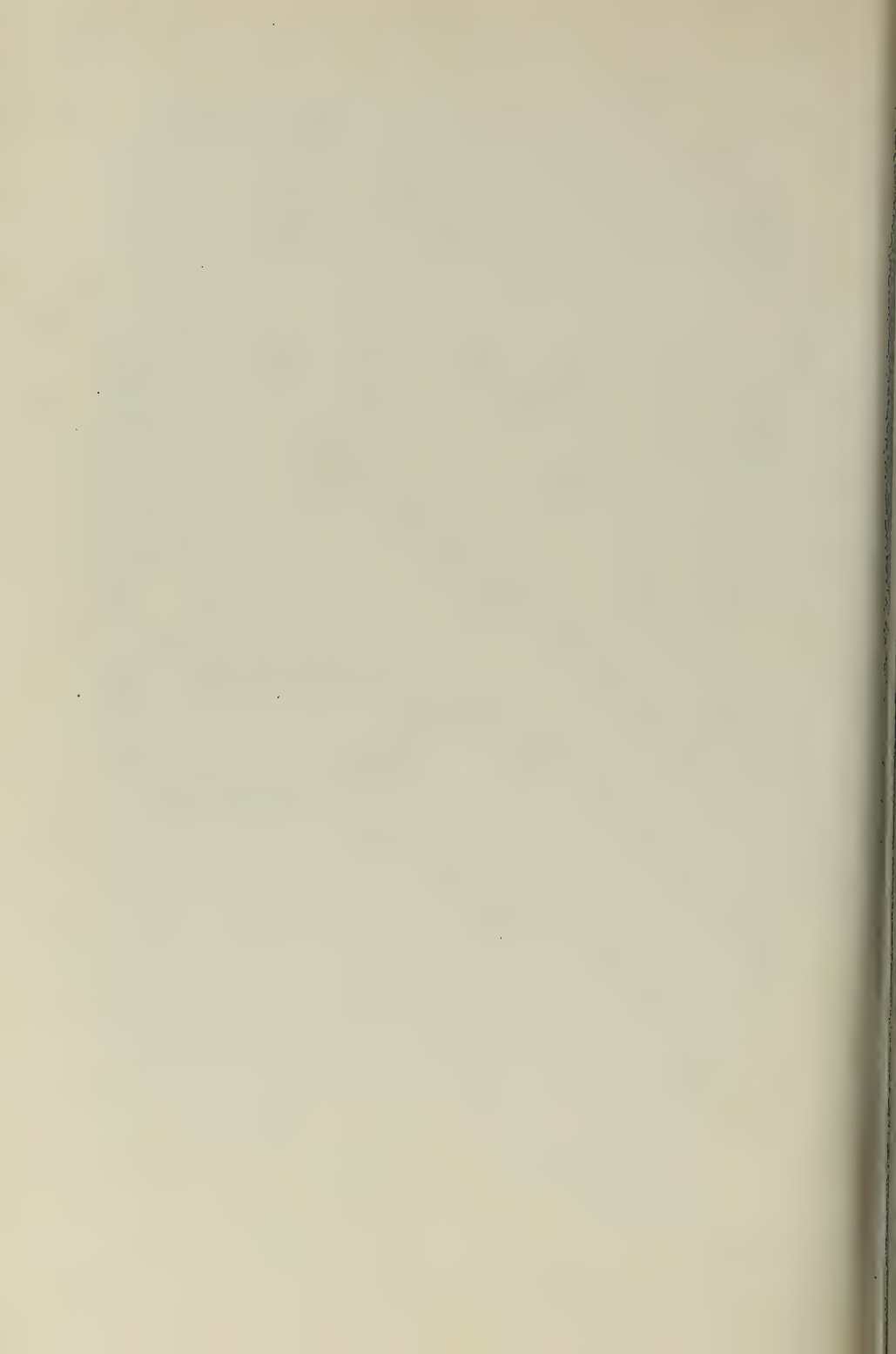
Martini Motor Truck Company (a Corporation),
Appellant, vs. United States of America. Citation
on Appeal. Filed Apr. 26, 1923. Walter B. Mal-
ling, Clerk. By C. W. Calbreath, Deputy Clerk.
[25]

{Endorsed}: No. 4026. United States Circuit
Court of Appeals for the Ninth Circuit. De Mar-
tini Motor Truck Company, Appellant, vs. United
States of America, Appellee. Transcript of Rec-
ord. Upon Appeal from the Southern Division of
the United States District Court for the Northern
District of California, First Division.

Filed May 8, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DE MARTINI MOTOR TRUCK COMPANY,

Appellant,

VS.

UNITED STATES OF AMERICA,

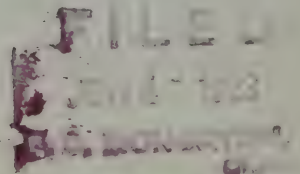
Appellee.

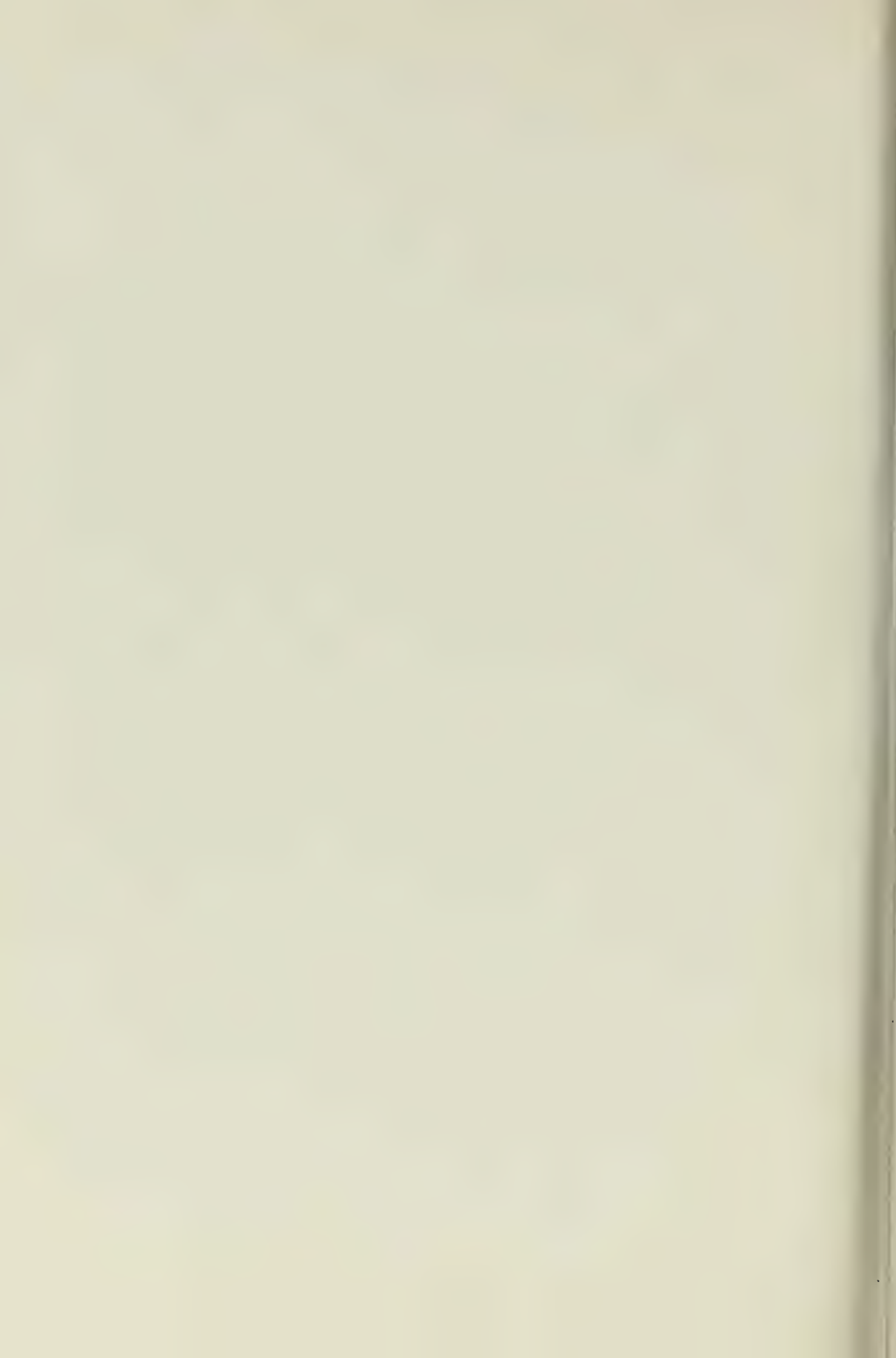
Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

BRIEF FOR APPELLANT

P. R. LUND,

Attorney for Appellant.





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United States Circuit Court of Appeals
For the Ninth Circuit

DE MARTINI MOTOR TRUCK COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

THE FACTS

This is an appeal from an order of the United States District Court for the Northern District of California, denying the relief sought by the intervenor there and appellant here, De Martini Motor Truck Company, through a petition for the return of personal property; or in lieu of the return thereof, the establishment of a lien in favor of petitioner upon the proceeds derived from the sale of said personal property, the said petition in intervention having been filed in the proceeding intitled "United States of America versus Guiseppe Capacioli" No. 12188 upon the records of said Court.

Said intervening petition (R2) shows that on December 4, 1920, an agreement, generally known as a contract of conditional sale, or a conditional

sales contract, was entered into between De Martini Motor Truck Company and one Guiseppe Capacioli, for the purchase by the latter from De Martini Motor Truck Company of an automobile, of a model known as a Two Ton Truck, and which was particularly described in said contract, a copy of which is attached to the intervening petition (R6).

The purchase price agreed upon was \$3100.00. At the time the contract was executed, the sum of \$900.00 was paid by Capacioli to the vendor, De-Martini Motor Truck Company. The balance of the purchase price, it was agreed should be paid in monthly installments. The vendor reserved to itself title to said truck until the full amount of the agreed purchase price was paid, upon which event the truck, by the terms of the contract, was to become the absolute property of Capacioli; but, by the terms of the contract, Capacioli was entitled to immediate possession of the truck and he was entitled to possess and control the same at all times from the date of the contract so long as he made the installment payments and observed the conditions of the contract.

On the date the contract was executed, December 4, 1920, Capacioli took possession of the truck and thenceforth it was under the control of Capacioli.

The transaction, as is the case in the great majority of instances when automobiles and motor trucks are sold upon installment payment terms—

and it is matter of common knowledge that large numbers of automobiles and motor trucks are so sold—did not differ materially from a transaction wherein a part of the purchase price is paid at the time of delivery and a chattel mortgage upon the automobile or motor truck is taken by the vendor to secure payment of the balance of the purchase price. It differed not at all as to any control of the truck by the vendor, so long as the vendee observed the conditions of the contract.

The intervening petition (R2) states that at the time said truck was entrusted to the care and custody of Capacioli, the petitioner, De Martini Motor Truck Company, had no knowledge or information, nor had the petitioner at that time or subsequently—until the arrest of said Capacioli, as hereinafter set forth—any notice or information, nor had petitioner suspected, that at the time said truck was entrusted to Capacioli, or subsequently, that Capacioli intended to use or was using said truck in unlawfully transporting intoxicating liquor.

From the time of the delivery of the truck until the arrest of Capacioli, he made the payments provided for in the said contract and performed the conditions thereof; so that during that time he was entitled to retain undisturbed possession and full control of the truck and the De Martini Motor Truck Company could not have exercised any control over it.

In the month of October, 1922, Capacioli was arrested for the illegal transportation of intoxicating liquor, and the said truck was seized by the prohibition enforcement officers.

At said time there remained due to De Martini Motor Truck Company as the balance of the purchase of the said truck, the sum of \$631.79. No payments on account thereof have since been made, and the said \$631.79 is still unpaid.

In December, 1922, De Martini Motor Truck Company, filed its intervening petition and prayed an order restoring it to possession of said truck, or, in lieu thereof, for an order establishing a lien in favor of petitioner upon the proceeds realized from the sale of said automobile to the amount of \$631.79. (The statement in the opinion of the District Court (appendix) to the effect that the petition asked for the *return* of the truck only, is incorrect—see prayer of petition (R5).

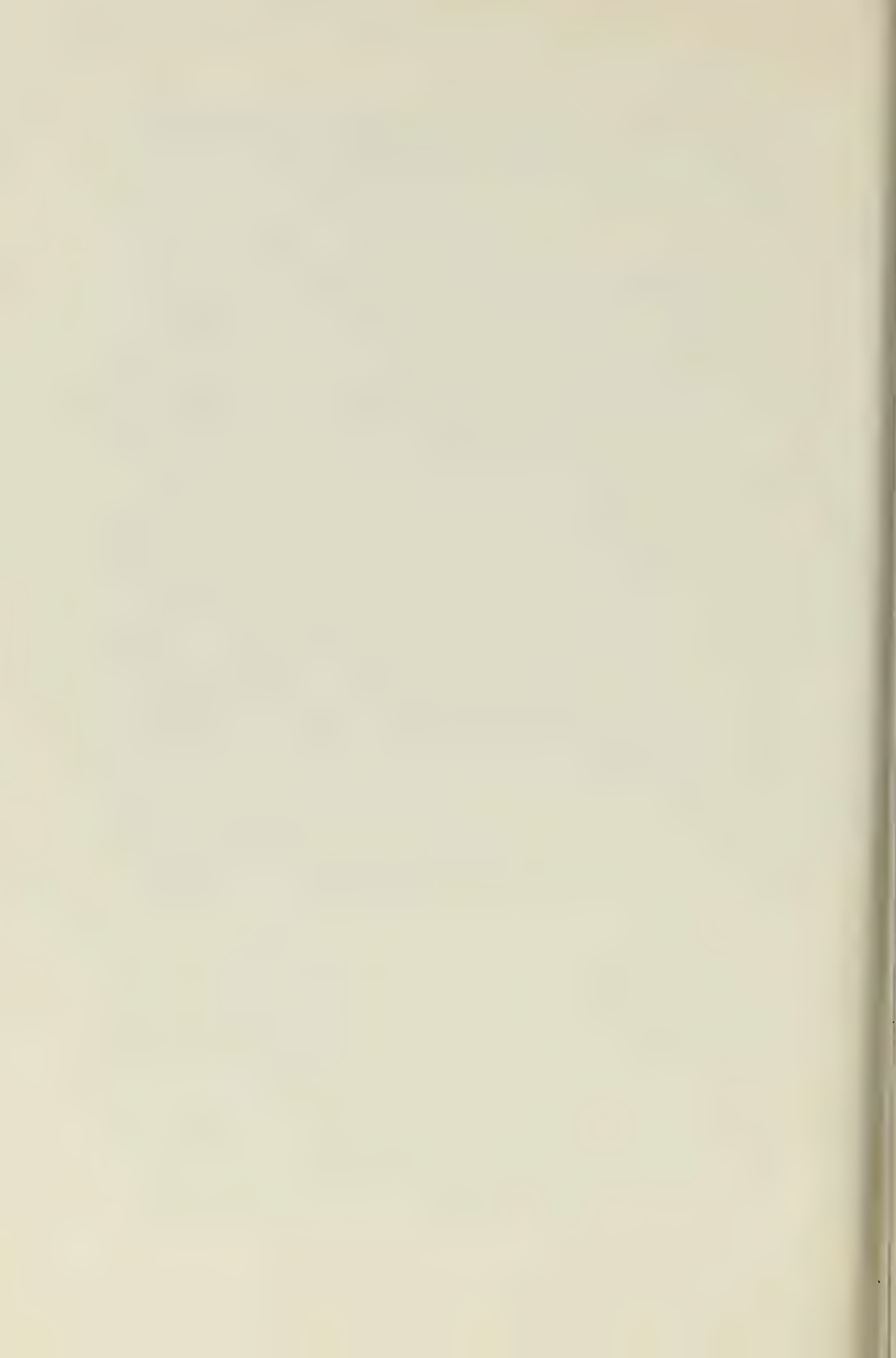
Subsequent to the filing of this petition, Capacioli entered a plea of guilty, and was sentenced to pay a fine.

Thereupon the United States Attorney filed a purported answer (R9) to said intervening petition. This document did not deny or traverse any of the statements or allegations of the petition. On the contrary, it contained merely a statement, which if true, would establish the guilt of Capacioli of illegally transporting intoxicating liquor; but, it

in nowise alleged any guilt or guilty knowledge on the part of petitioner, De Martini Motor Truck Company.

At no stage in the proceedings in the District Court was there any attempt by the Government, by pleadings, by affidavits, by the introduction of testimony, or otherwise, to show any guilt, possession of guilty knowledge or fault of any character on the part of the petitioner, De Martini Motor Truck Company.

The said intervening petition and its accompanying affidavit, together with the purported answer of the Government thereto, was submitted to the District Court, and on April 14, 1923, the Court made an order denying the prayer of the intervening petitioner for the return of said truck and refusing to establish any lien in favor of the intervening petitioner upon the proceeds to be derived from the sale of said truck.



ARGUMENT

1. Nothing to be found in the laws of California demands a disposition of causes of this character different from that made in other jurisdictions.

In the case of *United States vs. Sylvester*, 273 Fed. 253, the United States District Court for Connecticut, in a case similar in all respects to the instant one, says:

“What, then, is to become of the interest of the conditional vendor or the interest of the mortgagee? Are such persons to lose their interest in the vehicle or the value of their property right? The answer is a negative one, and is found in the provisions of Section 26, which guard against such loss, as far as possible.”

The pertinent provision of Section 26 of the National Prohibition Act are as follows:

“Whenever intoxicating liquors transported * * * illegally shall be seized by an officer he shall take possession of the * * * automobile * * * and shall arrest the person in charge thereof. * * * The court, upon conviction of the person so arrested shall order the liquor destroyed, *and unless good cause to the contrary is shown by the owner*, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which

are established, by intervention or otherwise, at said hearing or in other proceedings brought for said purpose, as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor."

The District Court for Connecticut, in applying the provisions of the statute follows the well-established rule of giving effect to *the whole*. It recognizes that the law intends to protect innocent persons from unnecessary and unjust loss, and recognizes that the vendor under a conditional sales contract, as well as the mortgagee, is entitled to protection, as, indeed, the very letter of the law provides.

The District Court in the instant case cites six California decisions which hold, in effect at least, that the vendor in a contract of conditional sale is the owner of the chattel sold until all the terms of the contract to be performed by the vendee are fulfilled—and, the Court says:

"It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government.

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof."

From which it may be fairly inferred that the District Court is of the opinion that the status assigned by state laws to a vendor under a conditional sales contract may govern his rights under Section 26 of the National Prohibition Act, and that he might have rights to protection in some jurisdictions, whereas he has none in others.

We are well aware that the decision of the Court in *United States vs. Sylvester* is not binding upon the District Court of California, but it should have sufficient persuasive weight to warrant the inquiry whether a difference in State laws justifies two diametrically opposing decisions in similar circumstances by courts of the same judicial system. The examination can perhaps be most quickly made by setting out a few of the chief characteristics of conditional sales contracts and the propositions of law applicable.

a. The validity of conditional sales contracts is well settled.

b. The nature of the contract is to be determined by all its terms—calling it a "lease", a "mortgage", etc., does not affect its character.

c. Title to thing sold remains in vendor until vendee has complied with terms of contract. Vendor in meanwhile is the owner of the chattel.

d. Upon breach of vendee, vendor has two remedies—he may repossess the chattel or sue for the amount due.

e. Having two remedies, vendor must choose one; he cannot pursue both.

Having set out these few propositions—we do not consider this phase of sufficient importance, as will appear later, to occupy the time of the Court with more—let us see if there is any difference between the laws of California and Connecticut which would warrant the chasm between *United States vs. Sylvester* and this case. *The difference is not to be found.* There is not to be found a distinction in the decisions of the two states. Taking the propositions in the order above given, we have the following paralleling decisions:

- a. *Liver vs. Mills*, 155 Cal. 459;
Greene vs. Carmichael, 24 Cal. App. 27;
Cooley vs. Gillan, et al, 54 Conn. 80.
- b. *The Parke & Lacy Co. vs. The White River Lumber Co.*, 101 Cal. 37;
Kohler & Chase vs. Hayes, 41 Cal. 585;
Miller vs. Steene, 30 Cal. 402;
Hine vs. Roberts, 48 Conn. 267;
Loomis vs. Bragg, 50 Conn. 228;
Bohmann vs. Perrett, 97 Conn. 571.
- c. *Potts Company vs. Benedict*, 156 Cal. 322;
Waltz vs. Silveria, 25 Cal. App. 717;
Henry Lewis, et al vs. McCabe, et al, 49 Conn. 141.

- d. *Holt Mfg. Co. vs. Ewing*, 109 Cal. 353;
Muncy vs. Brain, 158 Cal. 300;
Adams vs. Anthony, 178 Cal. 158;
Appleton vs. Norwalk, etc., 53 Conn. 4;
Crompton vs. Beach, 62 Conn. 25;
Alfred For Piano Co. vs. Bennett, 96 Conn.
 448.
- e. *Parke & Lacy Co. vs. White River Lumber
 Co.*, *supra*;
Holt Mfg. Co. vs. Ewing, *supra*;
Muncy vs. Brain, *supra*;
Hughes vs. Kelly, 40 Conn. 148;
Griffin vs. Ferris, 76 Conn. 221.

As there exists no difference between the law relating to conditional sales contracts in California and Connecticut, the decisions in *United States vs. Sylvester* and that in the case at bar cannot be reconciled on that score. In fact, we do not believe that they can be composed at all, and it is our view that the quotation above from the *Sylvester* decision is the correct interpretation of Section 26 of the National Prohibition Act, and expresses the intent of the Congress that enacted it, and that the decision in this case does not. The conclusion is forced upon us in small part only by what we have disclosed as to the laws of the respective states, and which would be found in comparison of the laws of almost any other states, but mainly by what appears to us to be

more pertinent features of the case, to which we will now pass.

2. State laws do not constitute a rule of decision in causes of this nature, nor can the status of a party or his rights in such cause be defined by reference to state laws.

Section 721, Revised Statutes;

Section 1538, Compiled Statutes.

“The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”

This is also the language of Section 34, Chapter 20 of the Act of September 24th, 1789, and it is therefore, the statute that was under consideration in *Swift vs. Tyson*, 16 Peters 1 and *Bucher vs. Cheshire R. R. Co.*, 125 U. S. 610, and the numerous decisions intermediate of the two and subsequent to the last mentioned case.

Some jurists have observed that these decisions are not always harmonious. Be that as it may, we think that whatever want of accord may exist relates to governing force of State laws in actions at common law, and that it has never been held that State laws form rules of decision in Federal Courts in the interpretation of statutes of the United States, in equity or in criminal prosecutions.

This cause is not an action at common law. It is an appeal for equitable relief in a proceeding authorized by a statute of the United States.

Federal statutes must be interpreted by Federal Courts, irrespective of State decisions.

Calhoun Gold Mining Co. vs. Ajax Gold Mining Co., 182 U. S. 499;

West Virginia vs. Adams Express Co., 219 Fed. 794.

In *Calhoun Gold Mining Co. vs. Ajax Gold Mining Co.*, *supra*, the Supreme Court says in refusing to give countenance to a decision of the Supreme Court of Colorado:

“There is serious objection to accepting the consequence as determinative of our judgment. We might by so doing confirm titles in Colorado, but we might disturb them elsewhere. The statute construed is a Federal one, being a law not for Colorado, but for all the mining States, and, therefore, a law for all, not a rule for one, must be declared * * * The court must interpret the statute independently of local considerations.”

The National Prohibition Act is a law for all the states. By every reason, it must be interpreted independently of local State laws.

State laws are not regarded in suits in equity in Federal Courts.

Neves vs. Scott, 13 How. 268;

Russell vs. Southard, 12 How. 139;

Boston, etc. vs. Slocum, 77 Fed. 345;
Butler et al vs. Douglass, 3 Fed. 612;
Johnston vs. Roe, 1 Fed. 692.

State laws do not constitute a rule of decision in criminal prosecutions in United States Courts.

Bucher vs. Cheshire R. R. Co., *supra*;
U. S. vs. Reid, 12 How. 361;
U. S. vs. Hall, 53 Fed. 352;
Logan vs. U. S., 144 U. S., 302;
U. S. vs. Jones, 10 Fed. 469.

Therefore, if the view should be taken that the proceeding instituted by petitioner in the District Court was part of a criminal prosecution, State laws could not be resorted to to determine petitioner's status or classification nor any rights or disabilities which it may have in that proceeding.

3. If a law is capable of more than one interpretation, Federal Courts will select that construction which is most equitable and just.

It has been seen that two very different interpretations of the same section (Section 26) of the National Prohibition Act have been indulged in by judges of two United States District Courts. We think it has been made to appear that this difference is in nowise called for or compelled by any controlling force which local State laws may exercise upon the decision of Federal Courts in causes of this character. Plainly, the Federal Courts are left in an en-

tirely independent position as regards state influence in interpreting and applying the provisions of a Federal statute.

Assuming that the statute is capable of more than one interpretation, which shall it be—one that seeks in the words of the written law authority to deal justly with the innocent, to protect such persons in their property rights and prevent unnecessary loss to them so far as may be, or, one that by strained construction, by disregard of the language of the statute, by unwarranted assumptions as to the legislative intent, attempts not to deal as justly as may be with the innocent, but hands out forfeiture, confiscation and causes unnecessary and destruction loss to those who are guilty of no more than having been engaged in a very large and important business in this country, and having employed in that business methods long sanctioned by the laws of every State in this nation?

The instruments to choose from are ready made in the decision of *United States vs. Sylvester, supra*, and in the decision in this case in the Court below as well as the decision of the United States District Court for Arizona in the case of *United States vs. Marshall Montgomery*, designated upon the records of that Court as C-448.

The Montgomery case appears to have largely influenced the decision of the Court below, for it quotes from it and approves the following language:

“It is not unreasonable to suppose that Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

The quoted language was used by the District Court for Arizona in deciding a case similar to this, so the “owner” referred to is, as is the petitioner here, the vendor under a conditional sales contract.

With the conclusions of the Court we respectfully but very decidedly differ.

It is unreasonable to suppose that the Congress in enacting Section 26 of the National Prohibition Act, which deals largely with the subject of vehicles used in the illegal transportation of liquor, was entirely ignorant of the business methods of one of the country's largest industries—the automotive industry. It is unreasonable to suppose that the Congress was entirely ignorant of the fact that conditional sales contracts are largely employed in the sale of automobiles—that probably one-half, or more, of all automobile sales were effected upon such contracts. It is unreasonable to suppose that Congress was entirely ignorant of the characteristics of a business instrument such as the conditional sales contract, which is so extensively used not only in the automotive industry, but which has been used for half a century or more in almost unenumerable other industries in this country. It is unreasonable to sup-

pose that Congress did not know that the chief office of the conditional sales contract, like the chattel mortgage, was to secure the vendor in the collection of the balance due upon the purchase price of the article sold. It is unreasonable to assume that the Congress did not know that upon the execution of such a contract, the vendor delivered the article sold into the possession of the vendee, and that from that time on the vendor had no more control or right of control over the chattel than a mortgagee under a properly worded chattel mortgage would have.

Upon a breach of a conditional sale contract, by the vendee, the vendor may repossess the chattel or sue for the balance due. Upon the breach of the conditions of a chattel mortgage, the mortgagee may take possession of the chattel covered by the mortgage, or he may sue for the amount due. The only difference in the position of the two parties is that if the conditional sales vendor repossess the property, it is his without further procedure, because he has never parted with the title, whereas the mortgagee must foreclose the mortgagor's interest in the property before he can obtain title. *A mere difference in procedure after breach by the vendee, but no difference in the amount or degree of control of the property that may be exercised by the vendor or mortgagee before any breach occurs.*

It is unreasonable to suppose that the Congress was ignorant of this situation.

It is unreasonable to suppose that the Congress, knowing the similarity in interests between those of conditional sales vendor and chattel mortgages, would take pains to protect the interests of the latter and leave those of the conditional sales vendor—by far the more numerous class—subject to forfeiture and confiscation without hope of redress.

In the decision in the Montgomery case, above referred to, the Court also says:

“I am, therefore, of the opinion that an owner while retaining title in himself delivers a car on conditional sale with power to use it in any way that the buyer may desire cannot escape a forfeiture if the buyer uses it unlawfully, by claiming that such unlawful use was without his knowledge.”

We contend that this conclusion is contrary not only to the intent, but to the very language of the National Prohibition Act. By Section 26 of the Act the Court “shall order the vehicle to be sold, *unless good cause to the contrary is shown by the owner.*”

An owner, among laymen as well as lawyers, is considered to be, according to this country’s best known lexicographer—Webster:

“One who has the legal or rightful title, whether he is in the possession or not.”

Unless the contrary appear—and it does not appear in the case of Section 26—that words are used

in a different meaning, their ordinarily accepted meaning must be accorded them.

Therefore, from the well-understood meaning of the word "owner", as well as the knowledge that the Congress must have had of the characteristics of conditional sales, and from the context of the section itself, it is plain that the "owner" referred to in Section 26 of the National Prohibition Act is not restricted to an owner in possession, *but to an owner in the fullest meaning that our language accords to the word.*

Manifestly the statute cannot refer to an owner in actual possession. In that case he would be the person guilty of illegally transporting liquor, and he could show no cause whatsoever why the vehicle should not be confiscated. It is impossible to suppose that the Congress intended to provide for such a burlesque situation.

If it means an owner who has voluntarily parted with possession of the vehicle—such as lent it—he cannot, during the duration of the loan, exercise any more actual control over the use and movements of the vehicle than can the conditional sales vendor. If he accompanies the vehicle and controls its use, and it is employed to illegally transport liquor, the owner is a co-defendant, and in no better position to show "good cause" than if he had been operating alone.

If the Court's conclusions are to be accepted, it would restrict the "owner" who can show "good

cause" to one from whom the vehicle has been stolen and then used for the illegal transportation of liquor, which is to assume that the Congress took pains to protect a few isolated owners to whom such a contingency might happen, and left the thousands of conditional sales vendors to the "mercy" of confiscation, and in the very same section of the Act provided protection for the interests of the mortgagee.

The fact that the "owner"—the conditional sales vendor—may sue the vendee for the balance due, is not an answer to our contention, nor should it favorably address itself to the conscience of the Court.

The statute gives to the owner a remedy to which he is entitled. This cannot be taken away on the ground that he can recover judgment against the vendee for the amount still unpaid.

Conditional sales contracts are exacted from purchasers of automobiles because they either have not the means to pay, at one time, the entire purchase price, or their property is in such condition that they are not considered sufficiently solvent for an open credit. A money judgment against many of these vendees would be worthless. Such a judgment against those who have become so shiftless and reckless as to engage in illicit liquor traffic would in almost every instance be so. If it had been the intention of the lawmakers that this should be the only remedy of the conditional sales vendor, why was any provision made to protect the chattel mortgagee? He also can sue upon his note. It is incon-

ceivable that two men in practically the same situation should be so differently dealt with—one of them so unjustly.

It is our contention that such restricted application is unwarranted; that it ignores the meaning of the statute; that it is not in accord with the manifest intent of its framers and that it violates the principles of statutory construction enunciated by our Courts.

4. The District Court, in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms, and has employed standards of interpretation that are contrary to the rules of construction employed by Federal Courts.

“Of two constructions of a public law, both fairly possible, courts of law will adopt that which equity would favor.”

Washington R. R. vs. Coeur D’Alene Ry.,
160 U. S. 101.

As a matter of fact, Section 26, National Prohibition Act, in so far as it relates to the protection of an owner, in possession or out of possession, of a vehicle seized does not admit of two constructions. It is plain that he is to be protected upon “good cause” being shown; but, for the purpose of this argument, let us assume that either one of two constructions is fairly possible. One construction would be that upon the owner showing good cause, he is

entitled to relief from the seizure of his property; the other is that while the right to relief, in these circumstances is plainly indicated, no specific procedure has been provided, as in the case of the lienor, and consequently the owner is without remedy and he must suffer a total loss of his property.

Need we hesitate for a moment as to which construction equity would adopt? Had it been the practice of equity to hesitate in situations of this sort, our equity jurisprudence would either never have been written or it would convey doctrines far different from those that prevail.

In such a case, the right having been indicated, equity *would find* a remedy—a procedure. Moreover, if its hands were not tied by statutory enactments, in a case of this kind, equity would declare the existence of the right as well as apply the remedy.

The District Court has ignored this principle in deciding the instant cause:

Where the language of a statute is clear, the statute is not open to construction.

Yerke vs. U. S., 173 U. S. 442;

Hamilton vs. Rathbone, 175 U. S. 419.

The National Prohibition Act is plain in that an owner of a seized vehicle who shows good cause is entitled to protection against confiscation of his property. To hold otherwise is to ignore the plain language of the statute.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, *avoid an unjust or absurd conclusion.*

In re Chapman, 166 U. S. 667;

Law Ow Bew vs. U. S., 144 U. S. 59;

Sioux City R. R. vs. U. S., 159 U. S. 360;

U. S. vs. Kirby, 7 Wall. 486.

(We use the word "sensible" as employed in the decisions; no offensive meaning is to be implied.)

A sensible construction of Section 26, National Prohibition Act, could but lead to the conclusion that it was the legislative intention to prevent the vehicle of an owner who "shows good cause" from being confiscated, without granting such owner any redress whatsoever. A sensible construction of said Act would give effect to the legislative intention to give such owner a remedy in the premises besides his right to sue a very probably insolvent debtor who had turned a criminal. A sensible construction of said statute would have resulted in avoiding the unjust conclusion that an innocent person who shows good cause, as provided by the statute, shall be punished without redress. A sensible construction of said statute would have avoided the absurd conclusion that while the Congress had provided for the protection of an innocent owner, he was not entitled to such protection because the Congress had failed to prescribe minute details of procedure, but instead had seen fit to give the Court a free hand in

dispensing justice to the owner in proportion to the good cause shown.

Where a particular construction of a statute will work injustice or occasion great inconveniences, it is to be avoided in favor of another and more reasonable construction possible.

Knowlton vs. Moore, 178 U. S. 77.

The particular construction of the National Prohibition Act, adopted by the District Court in this cause, worked great injustice. Another and more reasonable construction was possible—the opportunity was and is provided by the language of the statute itself.

No statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable.

U. S. vs. Tappan, 11 Wheat. 426;

The Palmyra, 12 Wheat. 15.

The National Prohibition Act prescribes relief for *all owners* of seized vehicles who show good cause. The decision in the instant case renders nugatory this provision, save, *possibly*, to an extremely limited class of owners, but renders the property of the vast majority of innocent owners likely to become involved in cases of this character subject to confiscation without redress. As to practicability, the decision goes further and shuts the door upon all solutions, practical or impractical.

“Effect should be given to all the provisions of a statute.”

Rhodes vs. Iowa, 170 U. S. 422;

Bernier vs. Bernier, 147 U. S. 246;

Beley vs. Naphtaly, 169 U. S. 361;

Rice vs. The Minn., etc. R. R. Co., 1 Black 378;

Platt vs. Union Pacific R. R., 99 U. S. 58.

Where a statute covers *all* of a class, and a decision limits its application to but a small number of that class, eliminating the majority from participation in the relief provided, *it does not give effect to all the provisions of a statute*. A statute that employs the word “owner” without qualification, embraces all persons whom the word, in the broadest generally accepted meaning of our language includes. The meaning so given to the word “owner” includes an owner out of possession (such as a conditional sales vendor) as well as an owner in possession. The decision in this case eliminates from the provisions of the statute conditional sales vendors out of possession of their property.

It is the duty of the Court to give effect to every word in a statute if it can be done without violating the intention of the legislature.

U. S. vs. Gooding, 12 Wheat. 477;

Bend vs. Hoyt, 13 Peters 272;

Market Co. vs. Hoffman, 101 U. S. 115.

The decision of the District Court in the instant case does not give effect to every word in the statute

in that it restricts the meaning of an unrestricted word when no legislative intention to do so is apparent. In fact the legislative intention is violated by such restriction, as the intent appears that the word "owner" is employed without qualification.

Every word of a statute must, if possible, be given some effect; nothing is to be stricken out if it can be avoided; it is not to be presumed that the legislature intended any part to be without meaning.

Allen vs. Louisiana, 103 U. S. 84;

U. S. vs. Temple, 105 U. S. 99;

Montclair vs. Ramsdell, 107 U. S. 152;

U. S. vs. Fisher, 109 U. S. 145;

Murphy vs. U. Her., 186 U. S. 111.

It was possible in this case to give effect to the language of the National Prohibition Act, providing that when an owner shows good cause his seized vehicle shall not be sold. The District Court refused to give any effect to that provision. Ignoring the provision has the effect of striking it out of the statute. The decision in this case renders meaningless that portion of the Act which provides that upon the owner showing good cause his seized vehicle shall not be sold.

5. Suggestions regarding protection of interests of conditional sales vendors.

By the foregoing we trust that we have shown that the conditional sales vendor, in circumstances such

as are presented by this case, has rights of property which are recognized and safeguarded by the provisions of the National Prohibition Act.

How are such interests to be cared for?

The District Court for Arizona, in its decision in the *Marshall Montgomery* case, says that "the difference between the provisions applicable to owners and those applicable to lienors is 'significant'."

The "significant" circumstances to which the Court refers seem to have appeared to it sinister, to have played an important role in arriving at the decision rendered.

It requires only a fair consideration of the provisions of Section 26, however, to show that there is nothing either "significant" or sinister in the fact that as to the "owner", the section makes no specific provisions as to what action the Court shall take, when he, the owner, has shown "good cause".

No doubt the framers of the law had in mind that an "owner", whether he be an owner in possession or one out of possession, such as a conditional sales vendor, has full title, and if the vehicle is returned to him, *there is nothing more to do*. No elaborate procedure need be prescribed.

Why should a Court accustomed to equity causes consider itself helpless when authorized by statute to deal justly with persons before it, merely because the statute does not point out in minute detail the

procedure that should be followed. Had the statute, in addition to declaring the right also prescribed the relief and the procedure in its administration, the Court would be limited by those provisions; but, as the right is declared without limiting provisions as to procedure, it would appear that the proper course for the Court to pursue would be to dispose of the matter presented as the "good cause shown" requires.

In most cases of intervention by a conditional sales vendor, the proper relief, we feel, would be to order the vehicle returned to such vendor.

The absence of procedure provisions as to an intervening "owner" and their presence in the case of an intervening mortgagee or other lienor, under the provisions of Section 26 of the National Prohibition Act, is not "significant" in the sense that it deprives the former of all or any rights to relief and grants such rights to the latter class. As we have said, a return of the vehicle to the "owner" is as full relief as he may expect, and pursuing such course is beset with no complications. The intervening owner already is clothed with title, and when the vehicle is returned to him he receives only that which he already owns.

Such is not the situation of the intervening lienor. It may be true that a chattel mortgagee, upon breach of terms of the mortgage by the mortgagor, may take possession of the mortgaged property, but this

is only for the purpose of better preserving his security.

Taking possession of the property does not vest title in the mortgagee. There remains still the interest of the mortgagor, which must be extinguished by foreclosure before the mortgagee can acquire title to the property as "owner".

Manifestly then, the Court could not, in an intervention by a mortgagee or other lienor under the provisions of Section 26, order the seized vehicle turned over to the intervenor. He has no title to it—*he is not the owner*—and he has but an interest in the property as security for the payment of the amount due him. To realize that amount the property may be sold. At the sale the mortgagee may buy it in for the amount of his claim and thus acquire title, but the sale must be had.

The framers of the National Prohibition Act substituted a sale of the mortgaged vehicle under procedure prescribed by the Act for foreclosure proceedings in accordance with State laws and the provisions of the mortgage. The reason is easily found. If a surplus remains out of the proceeds of the sale, after all *bona fide* liens have been paid, that surplus represents the defendant's interest in the property, which interest is confiscated by the Government.

In the case of *United States vs. Sylvester, supra*, the Court states the following conclusion respect-

ing the interpretation of Section 26 of the National Prohibition Act.

“Fourth—A *bona fide* vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his *bona fide* lien, as far as possible.”

The Court classes the vendor with the mortgagee, both as lienors, for the reason, expressed elsewhere in the decision, that:

“Seventh—In the fourth instance, after the *bona fide* lien and lack of notice or knowledge have been established, the vehicle should be sold at public auction, and after the costs, as provided by law, have been paid, the United States Marshal shall then pay, if possible, the amount of the *bona fide* lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States.

“(5) To grant this petition (a petition by a conditional sales vendor for return of a truck) would permit a lienor or mortgagee to profit by the transactions, and that result was never intended by the framers of the law. Cases may arise where the application of this rule would result in realizing an insufficient amount at the sale to pay the full amount of the *bona fide* lien; but where a substantial amount has already been paid, as here, on a new truck, undoubtedly the full amount of the balance due, plus the

costs, will be realized, so that the lienor will be fully protected.

“(6) Where, however, the amount paid by the purchaser is small in proportion to the purchase price, so that a large amount will have to be realized by the United States Marshal at the sale, and where the highest bid is insufficient to meet the costs and the amount of the *bona fide* lien, the United States Marshal shall then abandon the sale and report the facts to the Court for further instructions.”

We have no inclination to quarrel with the above decision in any respect. The Court is too apparently striving to apply the law justly and to protect the interests of all concerned for us to assume a critical attitude. And the circumstances of the case before the Court perhaps fully warranted all the conclusions reached.

We think, however, that the Court has over-estimated the probability of more than the amount of the lien being realized at the sale.

The value of the automotive vehicles is affected largely by temperamental considerations. This is particularly true of non-commercial vehicles—so-called “pleasure cars”;—a car that has been used is a “*second-hand*” car. No matter for how short a time it has been used, or how slightly it has been used, it is “*second-hand*”, and its value, as compared with a new car, is greatly diminished. Then there is the matter of “*Model*”. An automobile of 1922

Model is worth much less in 1923 than a Model of that year, although the 1922 Model car may never have been used. Perhaps the decline in value is not in proportion with the drop in that of a woman's hat or gown of last year's "style", but the phenomenon will help us to understand.

When actual use of an automobile is added to age the result in value reduction is startling. More startling yet is the diminution when the usage has been rough.

Those who decide to engage in the illicit liquor traffic are not likely to be gentle persons, and their treatment of things entrusted to them is not calculated to enhance their value.

In practice, what we are most likely to find in cases of this character is that the vehicle seized is dirty, dented, scratched, its outer parts and accessories broken, top in tatters, paint or enamel rubbed off, and not infrequently the engine and other mechanism damaged.

Such a vehicle, at forced sale in the same condition as when seized, will bring very little as a purchase price. It would have to be a very exceptional case where the amount realized would equal the balance due the conditional sales vendor.

On the other hand, if the vehicle is returned to the vendor and by him overhauled and rehabilitated and it is placed on the market for sale in the ordinary course of trade, the vendor may eventually

realize the balance due him—at least he will come nearer to it than he would from any proceeds derived from a Marshal's sale.

Whenever a vehicle is sold by the Marshal for an amount less than sufficient to defray the costs, as provided by law, and the vendor's claim, there is no defendant's interest to confiscate and the Government gains nothing—and in almost every instance the amount realized will be insufficient to meet both the costs and the vendor's claim, *and the vendor is the loser.*

In *United States vs. Brockley*, 266 Fed. 1001—a case where the petitioners for the return of an automobile seized under the provisions of Section 26, National Prohibition Act, showed that they had lent the automobile to the defendant without any knowledge that it was to be used or that the defendant intended to use it for the illegal transportation of liquor—the Court says:

“Whether the property seized shall be confiscated and sold depends upon the facts appearing and whether the facts presented constitute good cause or reason to the contrary is a question addressed to the *judicial sense* and judgment of the Court. This provision in the act is not analogous, as was contended for by the Government's attorney, to that found in Section 3450 of the Revised Statutes (Comp. St. Sec. 6352) under which it has been held that the ignorance of the owner of a vehicle used by a

third person for the removal of goods with the intent to defraud the United States, will not save his property from confiscation. * * * From these cases, as well as from the general provisions of the revenue laws therein construed, it is conclusive that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture absolutely, whether or not good cause appear to the contrary."

"The admitted facts in this case show ownership and want of knowledge on the part of the vehicle's owners as to the purpose for which the vehicle was to be employed. *Without any other attending circumstance, this is sufficient to warrant the Court to order its return.* It might be otherwise if, from the reputation of the person intrusted with the vehicle or other circumstances attending his occupation or employment, the inference might arise that the owners had reason to suspect that their property might be used for the purpose it was employed."

"The construction contended for by the learned representative of the Government would admit of no reason or cause for the return of property used in connection with a violation of the provisions of this statute, if such was intrusted to the violator of the same and used in connection therewith. *This would work greater hardship upon innocent owners of such property than was contemplated by the legislators; otherwise they would not have provided for the return on good cause shown.* (Italics ours.)

“The order formerly entered is vacated, and the property seized, one Hudson touring car No. 632-971, *is to be delivered to the petitioners*, when storage and charges, if any, are paid by the owners.”

In *McDowell vs. United States*, No. 3865, recently decided by this Court, it was held that Section 3450 Revised Statutes, had been repealed by the enactment of the National Prohibition Act, and that the harsh conditions of confiscation provided by Section 3450 no longer applied in a case such as that now at bar.

Notwithstanding this and notwithstanding decisions in Federal Courts of other jurisdictions, showing an inclination to apply the milder and more just provisions of the National Prohibition Act to cases of this nature, the District Court for Arizona and the District Court for the Northern District of California, in this case, have virtually “re-enacted” Section 3450 in all its serenity. We contend that in so doing the said Courts have gone far beyond their authority.

It will be seen that in interpretation the Court in the *Sylvester* case was in accord with the *Brockley* case—only in the disposition of the vehicle do they differ. In fact, they do not differ so much even in that respect, for it may be fairly implied that in a case which would appear proper to the District Court for Connecticut it would return the vehicle to the owner instead of ordering it sold and the

owner's claim paid from the proceeds of the sale. They are one, however, on the proposition that an owner who voluntarily parts with possession of his property, which is afterward without his knowledge used for the illegal transportation of liquor, has a right to protection, and that his vehicle cannot be confiscated upon good cause being shown.

As we have already indicated, we think that a return of the vehicle to the owner, in such circumstances, is the course most likely to promote practical justice, and we urge that the practice be approved.

In the Brockley case, the owners were out of possession of the automobile when it was used for the illegal transportation of liquor, because they had *lent* it. We do not think that, for a case such as this, they were in a materially different position from an owner who has parted with possession under a conditional sales contract—only that if any inferences as to innocence and want of knowledge on the part of the owner is to be indulged in, it favors the conditional sales vendor.

One who lends so valuable a chattel as an automobile to another, without pay, must know him fairly well, and there is consequently more reason to suspect that the lender has a more intimate knowledge of the borrower's character and business than could be expected from a conditional sales vendor as to his vendee, and for that reason the equities in favor

of a conditional sales vendor are even greater than those of a lender.

Our view is that the framers of the National Prohibition Act intended to give the Court a free hand in all cases where an "owner" has shown "good cause" to deal with the situation as the circumstances warrant and that, therefore, it is unnecessary to lay down any rigid rule which must be adhered to in every case. We feel that if the Court is satisfied that nothing above the costs and the vendor's claim will be realized by a sale, the Court may return the vehicle to the vendor. If it is apparent that enough will not be realized from such sale to meet these two items, then the Court should order the vehicle returned to the vendor upon his paying the costs. If a case arises where it is likely that more will be realized than the aggregate of costs and the vendor's claim, then the rule laid down in *United States vs. Sylvester* would, no doubt, be the one to follow. The Court is not bound by the provisions of State laws prescribing the status, rights and obligations of parties to conditional sales contracts, in proceedings of this character, but it may look beyond the mere words of the instrument and construe the status of the claimant as a lienor instead of an owner.

CONCLUSION

We earnestly ask for the following conclusions in this case:

1. That there is no provision in the laws of California that renders a decision in this case different from decisions in similar cases in other jurisdictions necessary or proper.

2. That State laws have no governing force in determining the status or the rights of the petitioner in this case.

3. That the District Court has misinterpreted the National Prohibition Act and the rights granted by it to petitioner, when determining this cause.

4. That the District Court in determining this cause has placed a construction upon the National Prohibition Act that is not warranted by its terms and has employed standards of interpretation that are contrary to the rules of interpretation employed by Federal Courts.

5. That as to owners of seized vehicles the Court is vested with discretion as to procedure to attain the objects of the National Prohibition Act in that respect and that it is the object of said Act to protect innocent vendors from loss as far as possible and that Courts should act with that end in view.

And, as a consequence of said conclusions, we respectfully request that this Court annul and overrule the order heretofore made and entered in this cause

by the United States District Court for the Northern District of California, on April 14th, 1923, and that this Court grant the prayer of the petitioner for the return to it of the personal property described in its petition herein; or, if this Court be of the opinion that a return of said property is not the proper relief to be granted the petitioner, then that this Court order that petitioner have a lien upon the proceeds derived from the sale of said property to the amount due under its contract of conditional sale and that said amount be paid to petitioner, after deducting from the amount realized from the sale of said property the costs, as provided by law, and that in the event the remaining sum, after deducting said costs, be not sufficient to pay petitioner's claim in full, then that the whole of said balance, after deducting the costs, as aforesaid, be paid over to the petitioner.

Respectfully submitted

P. R. LUND,

Attorney for Appellant.

San Francisco.....**JUNE**....., 1923.

APPENDIX

In the Southern Division of the United States District Court,
for the Northern District of California.

First Division.

No. 12871.

No. 12188.

No. 12296.

No. 12957.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL BELLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPE CAPACIOLI,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. O. KILDALL, et al,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK MODESTI,
Defendant.

ORDER DENYING MOTION**PARTRIDGE, JOHN S.**

In each of the above entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition Law provides: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile * * * and shall arrest any person in charge thereof. The courts upon conviction of the person so arrested, shall order the liquor destroyed and, unless good cause to the contrary is shown by

the owner, shall order a sale by public auction of the property seized, and the officer making the sale * * * shall pay all liens according to the priority, which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor."

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Sylvester*, 275 Fed. 253 allowed a lien for the amount of the unpaid purchase price under what the opinion calls "a conditional bill of sale," although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit "a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law."

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshall Montgomery, et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: "It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have the use of a

to suppose Congress had in mind the fact that an owner may determine who shall have the use of a vehicle and thus, in a measure, control such use, while a lienor may not, because he is at no time entitled to its possession.”

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this State that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. Ap. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price.

First, he can take back the property because the title is still in him;

Second, he can waive this right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States* No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved

was whether *Section 3450* of the Revised Statutes had been repealed by the provisions of the National Prohibition Act. It was clearly recognized that under *Section 3450*, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provision of the Revised Statutes was in effect repealed by *Section 26 of the National Prohibition Act*. It is therefore apparent that unless language is found in *Section 26* which would relieve the vendor under a conditional bill of sale from the provisions of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable:

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

(Endorsed): Filed April 14, 1923.

WALTER B. MALING, *Clerk*.

By C. W. CALBREATH, *Deputy Clerk*.

No. 4026

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DE MARTINI MOTOR TRUCK COM-
PANY,

Appellant,

VS.

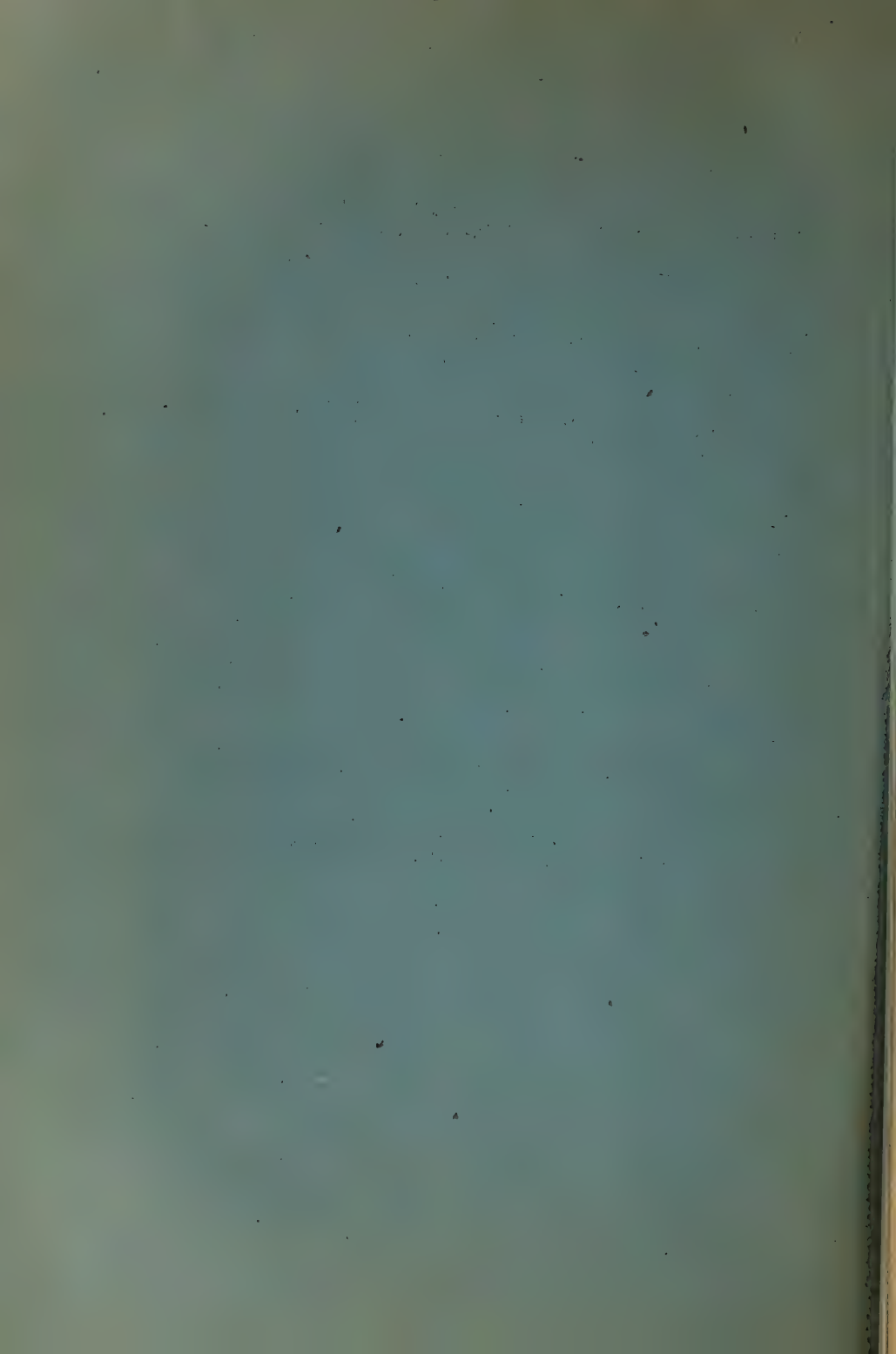
THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Appellee.



No. 4026

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DE MARTINI MOTOR TRUCK COM-
PANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

STATEMENT.

This is an appeal from the order of the United States District Court for the Northern District of California refusing to grant the petition of appellant for certain relief made in a criminal case entitled *United States vs. Capacioli*. There is also pending here appeals in two other cases, to wit, *Oakland Motor Car Company vs. United States of America*, No. 4025, and *Howard Automobile Company vs. United States of America*, No. 4027. The

three appeals apparently relate to similar situations and are presented on printed Transcripts of Record in the same form. Briefs for appellant have been filed only in the case of *De Martini vs. United States*, No. 4026; at least no brief in any of the two remaining cases has been served upon appellee.

The record presented here is very meager. There is presented the affidavit of One Guido Braccini, to which is attached as a single paragraph the petition of De Martini Motor Truck Company for the return of a truck. The affidavit shows that on December 4, 1920, the Truck Company sold to one Guiseppe Capacioli a certain motor truck. The agreement of sale was in the form of a conditional sales contract, a photostat copy of which appears in the Record attached to the affidavit, and from which it appears that the conditional sales contract was substantially similar to the contract set forth in the case of *H. O. Harrison Company vs. United States*, No. 4065. Under the contract the purchase price was to be paid in installments and the title reserved in the vendor until the full purchase price was paid. The affidavit further states that of the purchase price a specified sum was unpaid. It is further set forth that in October, 1922, Capacioli was arrested and the truck seized for the unlawful transportation of intoxicating liquor in violation of the "National Prohibition Act," and that the truck was then in possession of the United States Prohibition Officer. The affidavit finally contains the statement:

“*Affiant* further states that at the time said 2-ton truck was entrusted to the care and custody of Guiseppe Capacioli, defendant herein, this *affiant* had no knowledge or information nor has said *affiant* had any notice or information or suspected that said Guiseppe Capacioli since said time intended to use or was using said 2-ton truck in unlawfully transporting intoxicating liquor.”

The so-called petition does not set forth any additional facts. It consists of merely a prayer that the truck be surrendered to petitioner, or, if sold in the manner provided by law, that the amount due petitioner be paid from the moneys realized. The petition and affidavit was filed December 27, 1922. The Government answered, setting forth that for want of knowledge it denies that the petitioner had no knowledge or information or suspicion that the defendant in the above entitled action did not intend to use, or had used, or was using said truck in the unlawful transportation of intoxicating liquor. The answer referred to the affidavit of the Prohibition Agent which was attached and made a part thereof. The affidavit of the Prohibition Agent set forth that on October 6, 1922, such Agent, at San Francisco, found Capacioli with three other persons transporting seven barrels of red wine on the truck in question; whereupon the Agent arrested Capacioli and the others and seized the truck, and that the truck and wine were then, January 27, 1923, in the possession of the Federal Prohibition Director. Capa-

cioli stated to the Agent that the wine belonged to him and that he had hired the truck from one of the other defendants then present. The latter answer and affidavit was filed February 9, 1923. The printed Transcript of Record does not show in any way what was done with respect to the hearing of the petition and answer. There is no Bill of Exceptions or similar document in the Transcript. It does not appear that any or all of the facts set forth in either affidavit was admitted or proven, nor does it contain any testimony as given upon any hearing of the said petition. The next document printed in the Record consists of the Opinion of the Judge denying motions in four several criminal cases of which the case under review was one. The closing paragraph of the Opinion being "the motion, therefore, in each case will be denied." Whether orders denying the motion were after entered is not apparent. It will be observed from the printed Transcript that the record here fails to show what was done in the court below.

ARGUMENT.

A. THERE IS NO RECORD BEFORE THE COURT FROM WHICH IT CAN BE ABLE TO SAY THAT THE ACTION OF THE LOWER COURT WAS ERRONEOUS OR EVEN TO ENABLE THE COURT TO UNDERSTAND WHAT WAS IN FACT DONE.

We deem it sufficient merely to point out to the court that there is no sufficient record here to enable this court to determine whether the court below erred or not in refusing the application of appellant. Normally this should be done by a Bill of Exceptions bringing up such evidence as may have been produced in aid of the application and showing the proceedings that transpired when the court heard the application. Such a Bill of Exceptions has been brought up in the H. O. Harrison Co. case above referred to, and we deem it the proper method, but, if any other similar method could be availed of it has not been adopted. It cannot be said that the matter was heard upon the affidavit of petitioner and his petition and the answering affidavit thereto, nor can the court say that there was any agreement as to the facts made below, or that any testimony was introduced proving the averments either of the petition or affidavit of petitioner, for the reason that the proceedings have not been shown in any Bill of Exceptions or other equivalent document, nor can this court assume that the facts in this case are the same as the facts set forth in the affidavit of

Braccini appearing in the record. That affidavit was a mere pleading or petition to enable petitioner to present his case in court, and, moreover, it was denied in material portions by the answer of the Government. But if a witness had appeared who testified to the same things that appear in the affidavit, it would still have been insufficient to show good cause to prevent a sale of the car or to enable petitioner to participate in the proceeds as a lienor. For it will be noted that while the De Martini Motor Truck Company was a corporation and presumably having a president and a certain number of directors, who would know best of its affairs, there was no affidavit presented by either the president or any of the directors showing or tending to show that the *petitioner* had no knowledge, or information or suspicion that Capacioli intended to use or was using the truck in unlawfully transporting liquor. The qualifying affidavit in that behalf was made by a mere sales manager, not apparently a general officer, and so far from showing that petitioner had no guilty knowledge, it merely set forth that *affiant*, being such subordinate employe, had no such knowledge or information; manifestly something very different from proving that *petitioner* did not have such knowledge or that some of its principal officers did not have such knowledge. For aught appears, Capacioli himself or some of the three remaining defendants in the case might have been connected with the Company and officers thereof. The qualifying affidavit, if taken literally, as the proof at the

hearing, would have been wholly insufficient. But this court cannot see from anything in the record that the court had not ample showing before it to induce it to refuse to return the truck, or that there was not such a case made as to convince it that there was good cause to the contrary against ordering a sale of the truck, or to show that petitioner was a lienor entitled to the proceeds of the sale.

B. PETITIONER WAS NOT ENTITLED TO RELIEF IN ANY EVENT.

If we may gather from the course of the argument here that petitioner, being a conditional sales vendor, claims to be entitled as a *lienor* and upon the showing to be made by a *lienor* to participate in the proceeds of the sale, then we answer that in no proper view of the case would petitioner be such lienor. The title was to be reserved to petitioner until fully paid and a form of contract was adopted which effectually prevented any theory of a lien being reserved. The remedy contracted for by petitioner did not require it either to foreclose a lien or sell the property; it had the right of recapture whenever the vendee failed to comply. Upon no theory was petitioner, being a conditional sales vendor, a lienor and thus entitled to recover a portion of the proceeds of sale upon the showing required to be made by a mere lienor.

If we may guess, and under the record it would be a mere speculation, that petitioner adopting the theory that under its contract it was entitled to

reclaim the car from the vendee for condition broken and that, therefore, it sought to have the car returned to it in advance of the trial of the defendant, we answer that the statute regulating the matter does not authorize the return of a car in any event until the trial, unless the third party shall execute a bond to redeliver the car at the trial.

See Section 26 of Title II of the "*National Prohibition Act.*"

It would rather appear from the applicant's petition that the petition was filed in advance of the trial or conviction of the defendant Capacioli, although possibly denied after such conviction. In fact, there is nothing in the record to show whether Capacioli has been tried or convicted except a statement in the Judge's Opinion. But the opinion of the trial court constitutes no part of the record.

If petitioner applied after the conviction to show good cause as against the sale of the car, then it was required to assume the laboring car and undertake the burden of showing such good cause. If it merely filed a petition and thereafter failed to pursue the matter or appear at the hearing of such petition, we submit that it is manifest that there would be utter failure to show such good cause, nor could it be said that the action of the court in denying its application was erroneous.

We are entirely satisfied that the action of the court in the instant case was proper, but whether

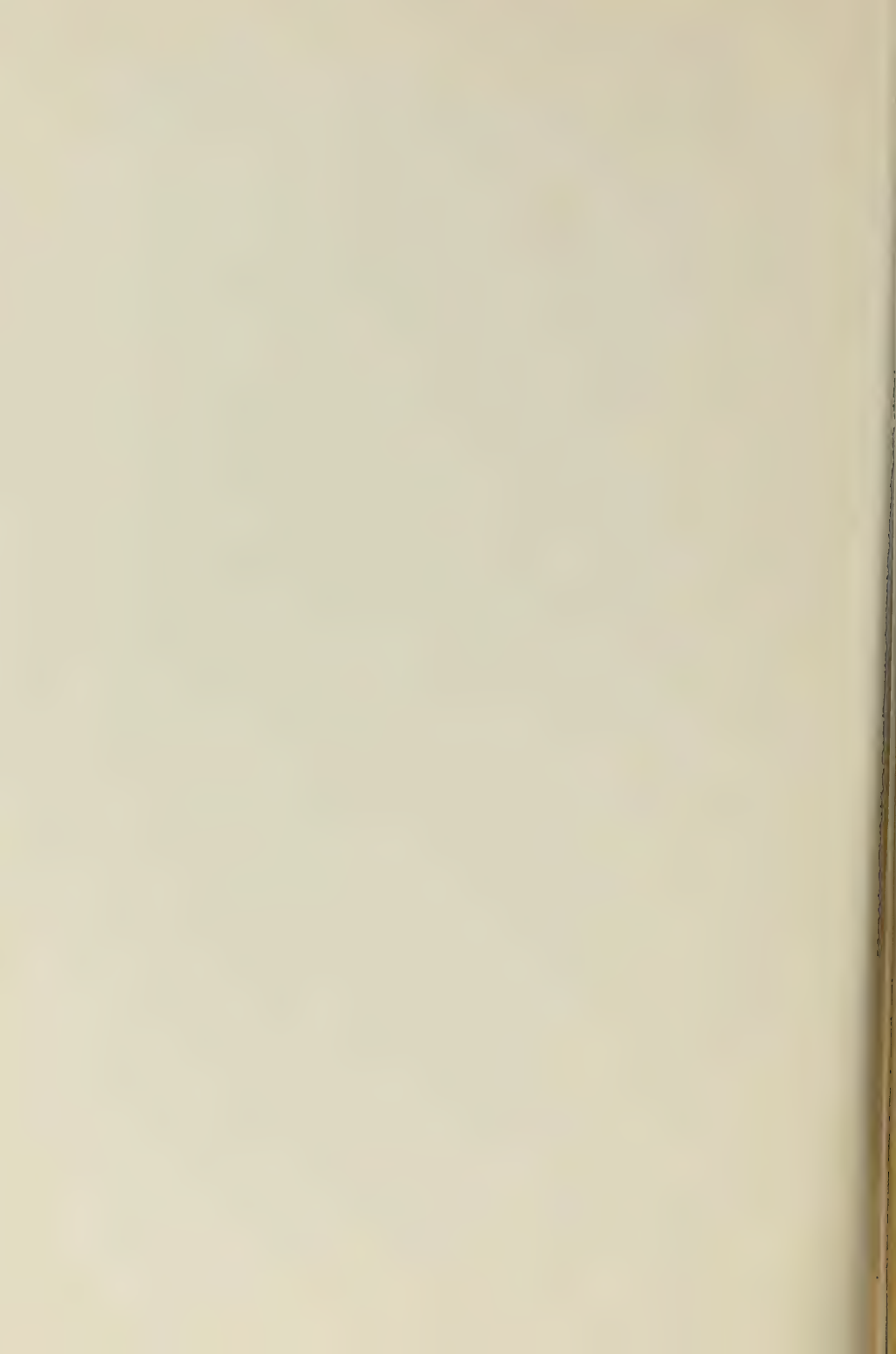
proper or erroneous, there is no such record on the instant appeal as to justify the court in giving that matter any attention.

We submit that the order in the instant case, as well as the order in the other two cases referred to, and as to which we ask that this brief be taken as the brief of appellee, be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERIDAN,
*Assistant United States Attorney,
Attorneys for Appellee.*



No. 4026

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DE MARTINI MOTOR TRUCK COMPANY,

Appellant,

VS.

UNITED STATES OF AMERICA,

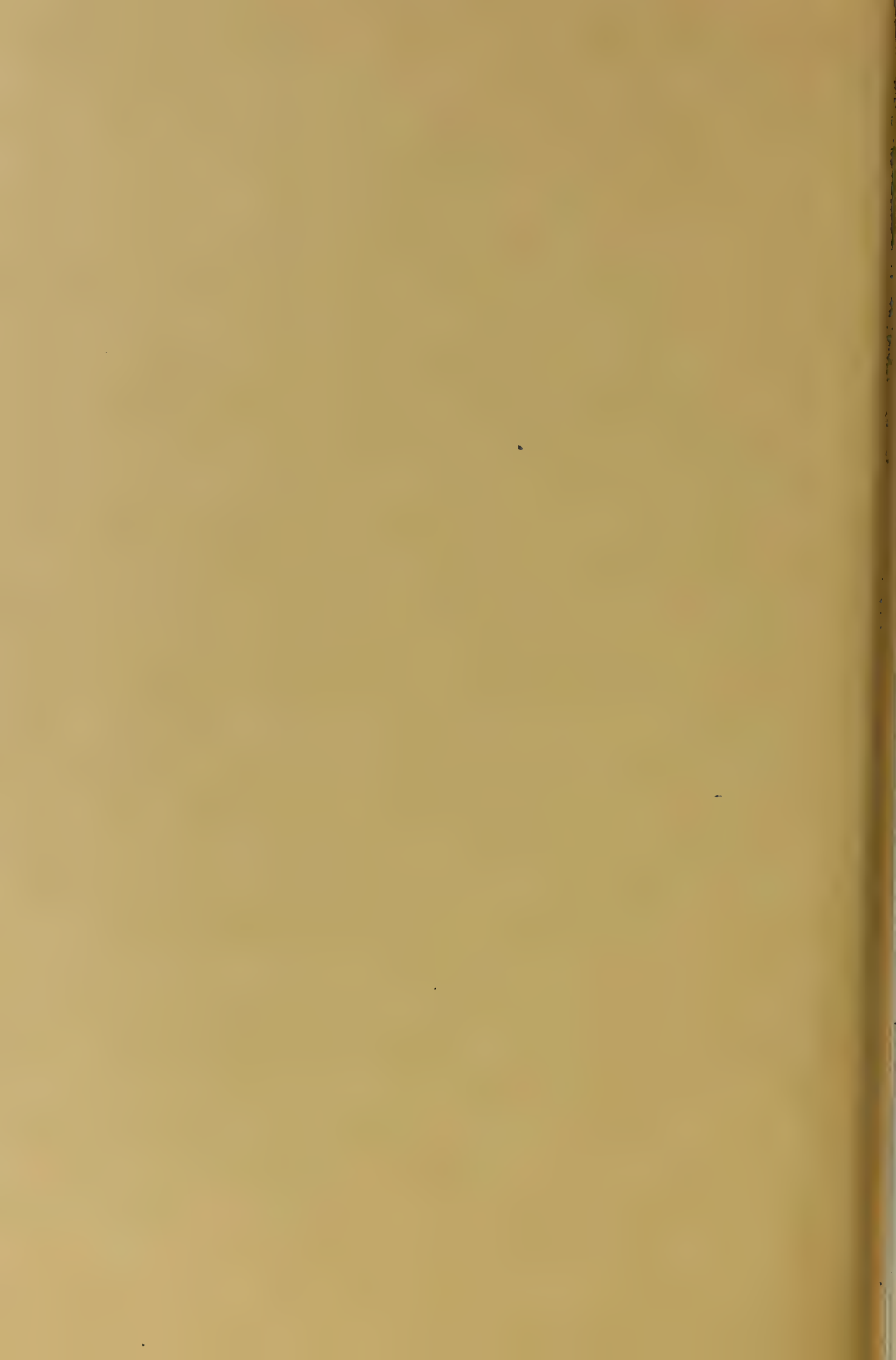
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

HARTLEY F. PEART,

Attorney for Appellant.

FILED
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No. 4026

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DE MARTINI MOTOR TRUCK COMPANY,

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Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

In addition to the authorities cited in appellant's brief, we desire to call the court's attention to the following points and authorities:

In the cases of

U. S. v. P. S. Smith and R. V. Tucker,
No. 5239,

and

U. S. v. Dick Carlow, No. 5400,

Mr. Justice Rudkin holds that an innocent conditional vendor is entitled to the return of the automobile, or, at least so much as may be due upon the ~~an~~ ^{can} additional contract of sale. This case arose in the District of Washington but there is no substantial difference between the Washington and California law with reference to sales contracts. The court says:

“These cases call for a construction of the provisions of the National Prohibition Act relating to the seizure and forfeiture of vehicles used in the illegal transportation of intoxicating liquors. The claimants and interveners are vendors in conditional sale contracts, the transportation was by the purchasers, and the vendors had no knowledge or reason to believe that the property was being used for an illegal purpose.

Section 26 of the act provides, among other things, as follows:

‘Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure and the cost of the sale shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been

created without the lien or having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property.'

It will be observed that the rights of two classes are thus saved and protected from the forfeiture; first, the owner, who shows good cause to the contrary; and second, bona fide liens 'created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor'. This section does not undertake to define what will constitute good cause to the contrary, but by referring back to Section 21 of the act it at once becomes manifest that the owner must show merely that he had no knowledge or reason to believe that the property was used or to be used for the illegal transportation of intoxicating liquor. Again, the innocent owner may reclaim his property and avoid a sale, while a mere lien is simply transferred from the property to the proceeds of the sale, and the liens are paid out of such proceeds according to priorities, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale.

What then is the status of the vendor in the conditional contract of sale? The claimants and interveners claim that he is the owner and may reclaim his property, while the Government claims that he is a mere lienor and must resort to the proceeds of the sale for the satisfaction of his claim. That such an owner or vendor is not a lienor is well settled by the decisions of the Supreme Court of this

state. Thus, in *Winton Motor Car Co. v. Broadway Auto Co.*, 65 Wash. 650, 654, the Court said:

‘The title, which is by this contract reserved in the seller, is the absolute title, under which he may retake the property, if at all, and retain it without an obligation whatever to account therefor, or for any surplus of the value thereof above the unpaid purchase price, to the purchaser. The thing which our law recognizes as being retained by the seller under this contract is not a mere lien or equity securing the balance of the purchase price, but the absolute title, which remains in him or passes from him to the purchaser absolutely, accordingly as the conditions of the sale are broken, or as they are fulfilled, or as may result from some act of election on the part of the seller.’

The court then quoted with approval from *Crompton v. Beach*, 62 Conn. 25, and *Alden v. Dyer & Bro.*, 92 Minn. 134, as follows:

‘A contract of conditional sale imposes no lien upon property in favor of the vendor, for that or any other purpose. He does not sell, and receive back a pledge. He retains the title until he elects to part with it, and when he does so elect, the title passes from him; but nothing else thereby springs up in its place in the nature of a lien or incumbrance upon the property, inuring to his benefit. * * * It must now be regarded as the settled law of this state, as well as in most others, that where personal property is sold and delivered with an agreement that the title thereto shall remain in the vendor until the payment of the purchase price, it is a conditional sale, and the transaction cannot be held a mortgage; and it is equally as well settled that, upon the vendee’s failure to comply with the condition as to payment, the vendor may elect to retake the property, or may treat the sale as

absolute, and bring an action for the price, but the assertion of either right is an abandonment or waiver of the other.'

The rule thus stated is not only sound in law, but is controlling upon this court. It must be held, therefore, that the vendor in such a contract is not a mere lienor within the meaning of the law. On the other hand, I am not prepared to hold that such a vendor can reclaim his property absolutely and unconditionally. Before condition broken the purchaser has an interest in the property, and that interest is undoubtedly subject to condemnation and forfeiture. How then may the rights of the conditional vendor be saved without defeating the policy of the law? In my view the way is simple. If in the opinion of the court the property will not sell for enough at forced sale to satisfy the claim of the vendor, no sale should be ordered, and the property should be restored absolutely and unconditionally to the owner. If, on the other hand, in the opinion of the court the property will bring more than the claim of the vendor, it should be ordered sold, but upon condition that no sale should be made for less than the amount of the unpaid purchase price. If a bid for more than that amount is not forthcoming the property should be restored to the owner; if a larger amount is bid the property should be sold and the owner paid the full amount of his claim out of the purchase price without deductions of any kind. This procedure will protect the rights of all concerned and impair the rights of none.

In the first case, where the property was used for an illegal purpose by a mere bailee without the knowledge or consent of either the vendor in the conditional contract of sale or the purchaser, the property must of course be restored to the owner. In the other case a

decree will be entered in accordance with the facts as they may be shown to exist."

In the case of

U. S. v. Addington, C. 1748,

Judge Fred C. Jacobs took practically the same view as Judge Rudkin.

In

Flint v. State, 85 So. 741 (Ala.),

the Supreme Court of the State of Alabama in construing the forfeiture provision of the state prohibition statute, says:

"But it could not have been the purpose of the Legislature, had it the constitutional right to do so, which we do not decide, to confiscate the property of innocent people or to make vendors and mortgagees of vehicles or other property insurers or guarantors of the conduct of their mortgagors or vendees, notwithstanding they may have exercised ordinary diligence and prudence in making the sale or taking the mortgage, and which would be the result if they are required to keep up with them all the time."

See, also,

Bowling v. State, 85 So. 500 (Ala.);

Hatcher v. Foster, 101 S. E. 299 (Ga.);

Packard v. State, 86 So. 21 (Ala.).

Dated, San Francisco,

October 29, 1923.

Respectfully submitted,

HARTLEY F. PEART,

Attorney for Appellant.

